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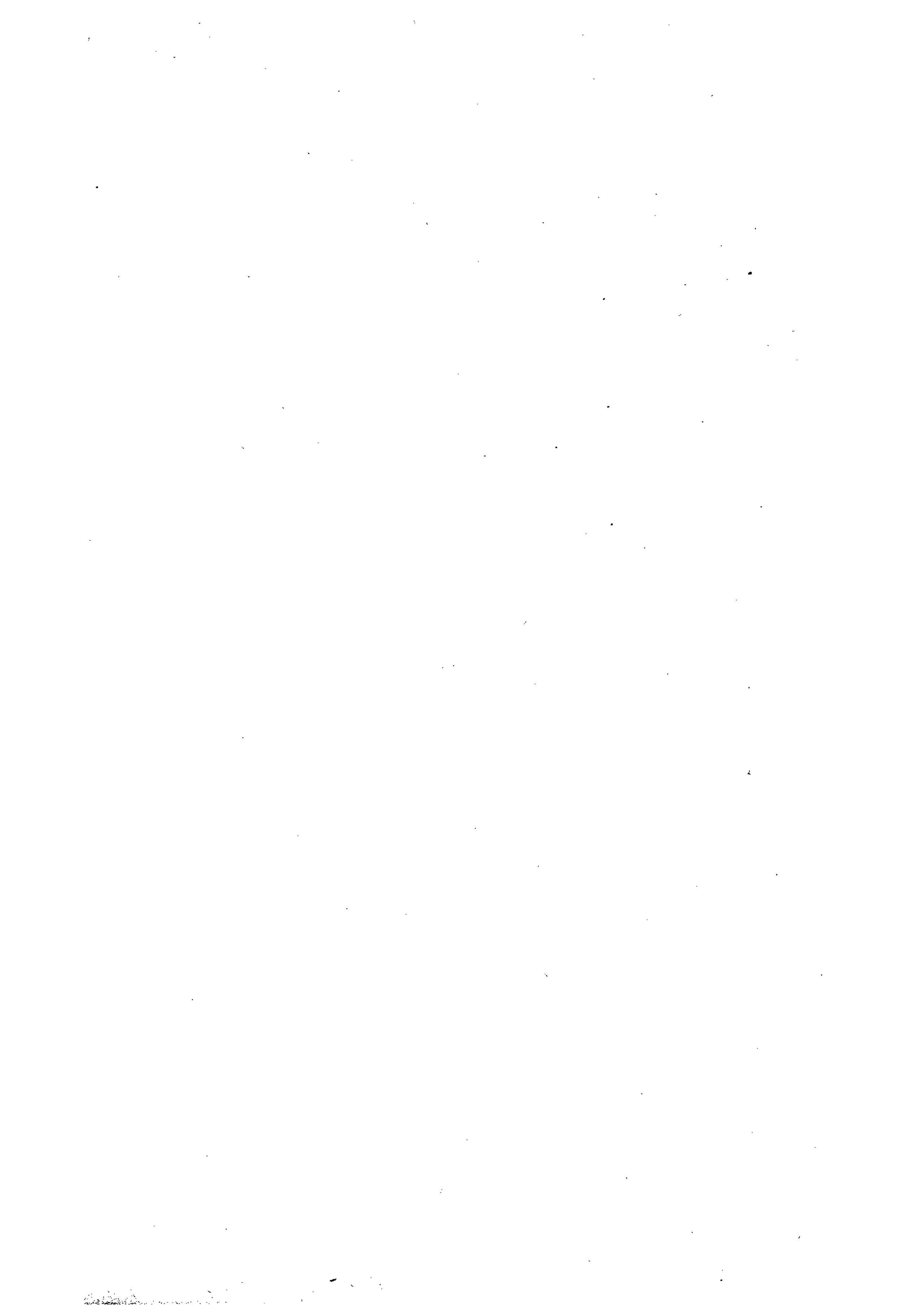

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FOREWORD

The most noteworthy case reported in this Volume is that of General Tomoyuki Yamashita who was tried and condemned by a United States Military Commission in Manila. His sentence was confirmed. The matter came before the Supreme Court of the United States on a petition for a writ of habeas corpus. The petition was rejected by that Court by a majority of the judges. The Court was not empowered to deal with the issues of fact which had been decided by the Court in Manila. The questions which came before the Supreme Court were questions of jurisdiction or competency. The majority, speaking by that great Judge, Stone, Chief Justice, whose death has deprived the Court of one of its greatest ornaments since its formation, held that the Military Commission was legally constituted, and that the charges exhibited in the Petition were within its competence because they were charges of violations of the law of war. The two dissenting judges founded their dissents upon certain technical question, no doubt of a basic character, but not calling for special notice here in this brief introduction which only deals with International Law. The observations of the Chief Justice (in which the majority of the judges agreed) are of leading importance for students of the law of war. In the first place there was the question whether the Military Court was validly and legally constituted. On that the Chief Justice repeated in effect what the Supreme Court had said in 1942 in *Ex parte Quirin* (Volume 317, United States Supreme Court Reports, page 1). He said that the law of the United States recognised that the Military Commission appointed by Military Command, according to recognised United States Army practice, was an appropriate tribunal for the trial and punishment of offences against the law of war (which he said is a part of the law of nations), and that offenders by statute or the law of war may be tried by such Military Commissions. The Court further repeated what it had said in *Ex parte Quirin* that Congress by sanctioning trial of enemy combatants for violation of the law of war by Military Commissions had not attempted to codify the law of war or mark its precise boundaries, but had adopted the system of Military Commission law applied by military tribunals so far as it should be recognised and deemed applicable by the Courts and as further defined by the Hague Convention. This is a general statement applicable to all military tribunals or commissions established for the same purpose by the law of the nations, and subject to any provisions of the latter law. The Supreme Court treated this principle as long established and referred to the jurisdiction of

the Military Commission or Court as " traditional." They added that they were not concerned, on such an application as that before them, with the guilt or innocence of the petitioners, which are not subject to review by the Court. If the Military Courts have come to a wrong decision on disputed facts, their errors are subject to review only by the military authorities. The Supreme Court further declined to say that there is no authority to convene a Commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognised by treaty or proclamation of the political branch of the Government. The power of Military Tribunals, otherwise competent, to try violations of the law of war, does not generally terminate before the formal state of war is ended.

The second principal matter decided by the Court had reference to the offences charged. The petitioner had not either committed or directed the acts which were the subject of the charges. The gist of the charge was that he had committed an unlawful breach of his duty as an army commander to control the operations of the members of his command by permitting them to commit " the extreme and widespread atrocities specified." This, the Court held, exhibited a proper charge of an offence against the law of war. This is an important though carefully guarded pronouncement. The tribunal of fact must decide the issue on a consideration of all the circumstances. The Supreme Court did not purport to discuss or review the sufficiency of the actual facts. But it stated the general principal firmly and clearly. The Commission was bound " to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt."

The only other point in the judgment to which I need refer here is the decision that Part III, Section V, Chapter 3, Part 3, and in particular Article 63, of the Geneva Convention of 1929 only apply to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war and hence did not come into operation as regards the petitioner who was charged with acts done before his capture.

It would be out of place in an Introduction to deal other than briefly with the three remaining Reports in this volume, which seem to deal with questions more or less similar to the question of the responsibility of commanding officers—viz., the trial of Kurt Meyer, the trial of Karl Rauer and others, and the trial of Kurt Student. The facts in each case are carefully stated and examined but it is not clear that the Courts dealing with the last two cases, which were decided upon after the delivery of the Supreme

Court's judgment, ever dealt with the standard of responsibility laid down by the Supreme Court. Hence these two cases cannot safely be regarded as doing more than illustrating conditions of fact which might test the application of the law laid down by the Supreme Court.

This Volume has been prepared by Mr. G. Brand, like its two predecessors, under the supervision of the Legal Publications Committee. The Appendix on Canadian Law has also been prepared by Mr. G. Brand and has been approved by the Canadian Department of External Affairs.

WRIGHT,

Chairman,

United Nations War Crimes Commission.

London, 17*th February,* 1948.

CASE NO. 21

TRIAL OF GENERAL TOMOYUKI YAMASHITA

UNITED STATES MILITARY COMMISSION, MANILA, (8TH OCTOBER–7TH DECEMBER, 1945), AND THE SUPREME COURT OF THE UNITED STATES (JUDGMENTS DELIVERED ON 4TH FEBRUARY, 1946).

Responsibility of a Military Commander for offences committed by his troops. The sources and nature of the authority to create military commissions to conduct War Crime Trials. Non-applicability in War Crime Trials of the United States Articles of War and of the provisions of the Geneva Convention relating to Judicial Proceedings. Extent of review permissible to the Supreme Court over War Crime Trials.

Tomoyuki Yamashita, formerly Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was arraigned before a United States Military Commission and charged with unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes. The essence of the case for the Prosecution was that the accused knew or must have known of, and permitted, the widespread crimes committed in the Philippines by troops under his command (which included murder, plunder, devastation, rape, lack of provision for prisoners of war and shooting of guerrillas without trial), and/or that he did not take the steps required of him by international law to find out the state of discipline maintained by his men and the conditions prevailing in the prisoner-of-war and civilian internee camps under his command. The Defence argued, *inter alia*, that what was alleged against Yamashita did not constitute a war crime, that the Commission was without jurisdiction to try the case, that there was no proof that the accused even knew of the offences which were being perpetrated and that no war crime could therefore be said to have been committed by him, that no kind of plan was discernible in the atrocities committed, and that the conditions under which Yamashita had had to work, caused in large part by the United States military offensive and by guerrilla activities, had prevented him from maintaining any adequate overall supervision even over the acts of such troops in the islands as were actually under his command.

The evidence before the Commission regarding the accused's knowledge of, acquiescence in, or approval of the crimes committed by his troops was conflicting, but of the crimes themselves, many and widespread both in space and time, there was abundant evidence, which in general the Defence did not attempt to deny.

The Commission sentenced Yamashita to death and its findings and sentence were confirmed by higher military authority. When the matter came before the Supreme Court of the United States on a petition for certiorari and an application for leave to file a petition for writs of habeas corpus and prohibition, the majority of that Court, in a judgment delivered by Chief Justice Stone, ruled that the order convening the Commission which tried Yamashita was a lawful order under both United States and International Law, that the Commission was lawfully constituted, that the offence of which Yamashita was charged constituted a violation of the laws of war, and that the procedural safeguards of the United States Articles of War and of the provisions of the Geneva Prisoners of War Convention relating to Judicial Proceedings had no application to war crime trials.

Mr. Justice Murphy and Mr. Justice Rutledge dissented. Questions other than those already mentioned which were touched upon either in the majority judgment or in the two minority judgments were the following: the applicability or non-applicability to such proceedings as those taken against Yamashita of the safeguards provided by the United States Constitution and particularly of the Fifth Amendment thereto ; the extent of review permissible to the Supreme Court over war crimes trials ; and the alleged denial of adequate opportunity for the preparation of Yamashita's defence.

Yamashita was executed on 23rd February 1946.

A. OUTLINE OF THE PROCEEDINGS

1. THE APPOINTMENT OF THE COMMISSION

The Court which tried Yamashita was a United States Military Commission established under, and subject to, the provisions of the Pacific Regulations of 24th September, 1945, Governing the Trial of War Criminals.[1] Acting under authority from General MacArthur, Commander-in-Chief,

(1) See Volume III of these Reports, p. 105.

United States Army Forces, Pacific Theatre, General Styer, Commanding General, United States Army Forces, Western Pacific, appointed the Commission, and instructed it to meet in the City of Manila, Philippine Islands, " at the call of the President thereof." The Commission was convened on 8th October, 1945, at the High Commissioner's Residence in Manila.

2. AN INTENDED DEFENCE WITNESS PERMITTED TO ACT AS DEFENCE COUNSEL

In addition to the six officers appointed by Lt.-General Styer to defend the accused, the latter requested that his former Chief-of-Staff, Lieutenant-General Muto, and his former Assistant Chief or Deputy Chief-of-Staff, Major-General Utsunomiya, should act as additional counsel. There were, he explained, a number of records and facts with which they alone were conversant. He needed their advice and assistance.

In view of the fact that the accused was proposing to call one of the men named as a Defence witness, however, the Prosecution submitted that, in a criminal proceeding, it would be entirely irregular for a witness for the Defence also to represent the accused as counsel. Even if his intention was not to serve as counsel, it would be equally irregular to allow the witnesses for a person accused as a criminal to sit in Court through the proceedings. He should be allowed to enter the court-room only if and when counsel proposed to call him as witness. On a Defending Officer stating that the proposed new Counsel would be in the court room only during the hearing of the Prosecution's evidence and that he would leave the court-room before the opening of the Defence, Counsel for the Prosecution pointed out that the damage would be done when the witnesses were in the court-room during the Prosecution's case and not during the hearing of the evidence for the defence.

The President ruled that, since it was the desire of the Commission to conduct a fair trial, the request of the Defence would be granted.

Lt.-General Muto subsequently appeared as a defence witness.

3. THE ACCUSED AND THE CHARGE

Prior to 3rd September, 1945, the accused, Tomoyuki Yamashita, was Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that date he surrendered to and became a prisoner-of-war of the United States Army Forces in Baguio, Philippine Islands. On 25th September, by order of Lieutenant-General Wilhelm D. Styer, Commanding General of the United States Army Forces, Western Pacific, which command embraced the Philippine Islands, Yamashita was served with a charge prepared by the Judge Advocate General's Department of the Army which alleged that he, " Tomoyuki Yamashita, General Imperial Japanese Army, between 9th October, 1944 and 2nd September, 1945, at Manila and at other places in the Philippine Islands, while a commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high

crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war."

On 8th October, 1945, the accused was arraigned before the Military Commission already described.

4. THE BILL OF PARTICULARS AND SUPPLEMENTAL BILL OF PARTICULARS

On 8th October, 1945, as a result of a motion put forward by the Defence,(1) the Prosecution filed a Bill of Particulars making 64 separate allegations, under a general introductory sentence which claimed that: "Between 9th October, 1944, and 2nd September, 1945, at Manila and other places in the Philippine Islands, members of Armed Forces of Japan under the command of the accused committed the following:" On 29th October, after a recess during which the Defence was to prepare its case, the Prosecution filed a Supplemental Bill of Particulars claiming that: "members of the armed forces of Japan, under the command of the accused, were permitted to commit . . . during the period from 9th October, 1944, to 2nd September, 1945, at Manila and other places in the Philippine Islands" a further 59 offences or groups of offences. The Defence claimed that the Supplemental Bill made a completely new type of allegation, but this view was not shared by the Commission.(2)

The classification of alleged offences made by the President of the Commission in delivering judgment may be reproduced at this point. He pointed out that: "The crimes alleged to have been permitted by the accused in violation of the laws of war may be grouped into three categories:

(1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war;

(2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives;

(3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offences extended throughout the period the accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon."

Nearly all of the 123 paragraphs contained in the two Bills of Particulars alleged the commission of a number of separate illegal acts; nearly all of them also charged the perpetration of more than one crime, of which "mistreating" and "killing" appeared most frequently. An attempt was clearly made to arrange under each paragraph offences alleged to have been committed in one locality during one period of time or at the same approximate date.

(1) See p. 8.
(2) See pp. 8-9.

Thus, in the first paragraph of the Bill of Particulars, appear a number of different categories of crimes, committed against thousands of persons and against property :

" 1. During the period from 9th October, 1944, to 1st May, 1945, undertaking and putting into execution a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed non-combatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity."

The fifth paragraph provides an example of one offence allegedly committed against a plurality of persons :

" 5. During November 1944, in northern Cebu Province, massacre, without cause or trial, of more than 1,000 unarmed non-combatant civilians."

Paragraph 122, which appeared in the Supplemental Bill, alleged the commission of one offence against one person, the killing, on about 20th January, 1945, at Los Banos Internment Camp, Laguna Province, without cause or trial, of a named non-combatant civilian citizen of the United States of America, then and there interned by armed forces of Japan.

While many paragraphs simply alleged, for instance, the " killing of patients and civilian refugees by shellfire " (12), the " rape of civilian women " (14), or " brutally mistreating and killing two unarmed non-combatant male civilians " (16), others set out the names of the victims. Paragraph 22 alleged the brutal killing without cause or trial of three named persons, an Austrian citizen, a German citizen and a Russian citizen, all unarmed and non-combatant civilians.

The offences against persons alleged in the two Bills were largely described in the following terms, often with the addition of the words, " without cause or trial " : mistreating, beating, wounding, torturing, mutilating, maiming, raping, attempting to rape, killing, attempting to kill, executing, burning alive, massacring and exterminating.

Other such alleged offences were the unjustified failure or refusal to provide prisoners of war or civilian internees with adequate shelter, food, water, clothing, sanitation, medical care, and other essentials it being sometimes stated specifically that such omission caused malnutrition and death ; abandoning, without care or attention helplessly sick, wounded or starved prisoners of war and internees ; and deliberately profaning the bodies of dead prisoners of war and internees ; compelling non-combatant civilians to construct fortifications and entrenchments and otherwise take part in the operations of armed forces of Japan against the country of those civilians ; deliberately and unnecessarily exposing prisoners of war and civilian internees to gunfire and other hazards; and deliberately contaminating and poisoning a well of water, the sole source of potable drinking water for a large number of civilians. A breach of the Geneva Prisoners

of War Convention was implied by paragraph 89, which alleged that, during the month of December 1944, at Manila, the crimes were committed against various prisoners of war, named and unnamed, of " subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel ; denying opportunity to appeal from the sentence pronounced ; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offence charged."

The Bills of Particulars also alleged many offences against property, again often of a mass and indiscriminate nature, on the part of the accused's troops. There were many allegations of the devastation, destruction and pillage, unjustified by military necessity, of public, private or religious property. For instance, paragraph 15 enumerates: " During the period from 1st January, 1945, to 1st March, 1945, both dates inclusive, deliberately, wantonly and without justification or military necessity, devastating, destroying and pillaging and looting of large areas of the city of Manila, including public, private and religious buildings and other property, and committing widespread theft of money, valuables, food and other private property in that city." Paragraphs 70 and 72 allege, *inter alia*, the destruction of property devoted exclusively to religious, hospital, or educational purposes. Paragraph 6 includes an allegation relating to, ". . . looting and stealing the contents of, and wilfully failing to deliver or make available, Red Cross packages and supplies intended for such prisoners of war."

Those stated to have been the victims of these atrocities were unarmed non-combatant civilians, civilian internees and prisoners of war ; and unspecified hospital patients. The civilians included Austrian, French, Russian, Chinese and German nationals as well as United States citizens.

The allegation that atrocities were committed according to a plan was made not only in paragraph 1, already quoted, (1) but also in paragraph 25, which sets out the following offences: " During the period from 1st January, 1945, to 1st March, 1945, deliberately planning and undertaking, without cause or trial, the extermination, massacre and wanton, indiscriminate killing of large numbers of unarmed non-combatant civilian men, women and children, inhabitants of the city of Manila and its environs, brutally mistreating, wounding, mutilating, killing and attempting to kill, without cause or trial, large numbers of such inhabitants, and raping or attempting to rape large numbers of civilian women and female children in that city."

In his opening address, the Prosecutor said that, in calling his witnesses, the number of the paragraph to which each piece of evidence related would be indicated. The legal significance of the Bills of Particulars was never defined by the Commission, and the brief analysis of their contents, which has been set out above, is intended simply to show the range of the offences for which the Prosecution held the accused responsible.

---

(1) See p. 5.

5. DEFENCE PLEAS AND MOTIONS RELATING TO THE CHARGE AND THE BILLS OF PARTICULARS

Apart from the plea of not guilty, a number of motions were entered by the accused and his Counsel concerning various aspects of the Charge and the Bills of Particulars. These are described in the following ten paragraphs. It will be noticed that, while the first nine paragraphs set out arguments which took place before the beginning of the hearing of the evidence, and the rulings of the Commission on the matters in dispute, the last paragraph deals with certain events which took place during the hearing of the evidence but which are most conveniently dealt with in this part of the Report.

(i) *Claim of the Accused that a Copy of the Specifications was not Properly Served on Him*

On 8th October, 1945, the accused pleaded that no copy of the specifications had been sent to him in accordance with paragraph 14 (*a*) of the letter dated 24th September, 1945, General Headquarters, United States Forces, Pacific, entitled " Regulations Governing the Trial of War Criminals " :

> " 14. *RIGHTS OF THE ACCUSED.* The accused shall be entitled:
>
> " (*a*) To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused of each offence charged."

The Prosecution claimed that the Charge which was served upon the accused included both what was ordinarily known as a Charge and also the specifications. In court-martial procedure, he went on, the Charge Sheet contained the Charge proper, as for instance the violation of the 86th Article of War. Underneath that, in a separate paragraph, would appear what was known as a specification, alleging that the accused, on a certain time, at a certain place, did certain things. If the Commission would examine the Charge which had been served upon the accused it would note that it did include both of those elements. He submitted that since court-martial procedure was much more strict in its provisions than the procedure followed before Military Commissions, it followed that the Charge against the accused was adequately drafted.

On finding that Defence Counsel were in agreement with the Prosecution on this point, the Commission ruled that the Charge and specifications had been properly served upon the accused.

(ii) *The First Motion to Dismiss the Case*

Later during the same sitting of the Commission, however, Defence Counsel moved that the Charge in hearing be stricken on the ground that it failed to state a violation, in so far as General Yamashita was concerned, of the laws of war. The Prosecution pointed out that the Commission had been ordered to try General Yamashita. If the Defence were seeking to raise a point of law, the appropriate time to do so was at the conclusion of the Prosecution's case, when they could move for a judgment of acquittal.

He submitted, however, that there was no provision in the Commission's procedure for a motion such as Defence Counsel was now interposing. The objection of Counsel for the Defence was not sustained by the Court.

(iii) *Motion for the Filing of a Bill of Particulars*

Thereupon, Counsel for the Defence claimed that the language in which the Charge and specifications had been drafted was uncertain and indefinite and did not fairly apprise the accused of that with which he stood charged. The Defence therefore moved that the Charge and cause in hearing be made more definite and certain, by specifying the time, place and dates of the accused's disregarding and failing to discharge his duty as Commander to control the operations of the members of his command. Details as to time, place and date should also be furnished as to the alleged offences and as to the persons who were allegedly permitted to commit them. The Prosecution, however, stressed that, although a motion such as this might be permissible in a court of law, the regulations the Defence was putting forward governing the Commission made no provision for such a motion. If the accused desired a Bill of Particulars, the Prosecution had no objection to supplying one ; what they objected to was an attempt to apply to the proceedings of the Commission " the technical objections and rules of evidence, pleadings and procedure which might apply in a court of law." Defence Counsel admitted that the Commission was not bound by the rules of a court of law, and based its application on principles of justice and fairness to the accused. Until they had received a Bill of Particulars, the Defence did not know what was charged and could not in fairness plead to the general issue of guilty or not guilty. The Prosecution then agreed to file a Bill of Particulars which they had already drafted, provided that they should have at a later date the privilege of serving and filing a Supplemental Bill of Particulars ; certain new information was expected from the United States, and other material had arrived too late for incorporation in the first Bill.

The Court granted the Defence motion for a Bill of Particulars and ruled that a Supplemental Bill of Particulars might be filed later, subject to such conditions as the Commission might then specify. The Court would judge these additional charges on their merits when the Prosecution presented them. Whereupon, the Bill of Particulars was received into evidence.(1)

(iv) *Plea of Not Guilty*

The accused was then asked for his plea to the Charge, and pleaded not guilty. The Commission then went into recess for three weeks to enable the Defence to prepare their case and the Prosecution to complete theirs.

(v) *Objection to the Filing of a Second Bill of Particulars*

On 29th October, the Commission was reconvened, and the Prosecution requested that there should be incorporated into the record of the proceedings the Prosecution's Supplemental Bill of Particulars. To this procedure the Defence objected.

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(1) See p. 4.

Defence Counsel began his argument on this point by claiming that on 8th October, 1945, the Defence had successfully objected to the granting to the Prosecution of the right to file a Supplemental Bill of Particulars, on the grounds that it was unprecedented and against ordinary principles of law and justice to allow the Prosecution, after a case had begun, to continue to file additional specifications. Counsel for the Defence submitted that any normal, intelligent person would assume that when the Prosecution, after filing sixty-four separate specifications, stated that they wished to file a Supplemental Bill of Particulars, that Supplemental Bill would probably contain one, two, three, four or perhaps even half a dozen additional particulars. Yet the Supplemental Bill of Particulars contained fifty-nine new, separate and distinct alleged offences. These fifty-nine offences were new in so far as the persons involved were concerned, in so far as the times were concerned, and for the most part in so far as the places were concerned. The Defence urged that it was " unconscionable in a case of this type practically to double at the last minute the list of offences charged."

In the second place, the Defence pointed out that whereas the first Bill had commenced with the words: " Between 9th October, 1944, and 2nd September, 1945, at Manila and other places in the Philippine Islands, members of Armed Forces of Japan under the command of the Accused committed the following: . . ." the opening words of the Supplemental Bill stated that ". . . members of the Armed Forces of Japan, under the command of the Accused, were permitted to commit " certain acts which were then set out. The new Bill alleged the granting of " permission " for 59 acts, and in no single case did it provide any details as to that " permission." It was not said who permitted any one of these acts, or how or in what circumstances.

The Prosecution first reminded the Commission that it had indeed given the former permission to file a Supplemental Bill of Particulars, then went on to say that there was no significance in the different opening wording contained in the two Bills. The purpose of the so-called Bill of Particulars was simply to specify the instances which were referred to generally in the Charge, and whether the Bill of Particulars said that the acts alleged were " permitted " or whether it claimed that they were " committed " by members of the command of the accused was immaterial. There was no provision in the regulations governing the procedure of such Commissions as the present for the production of a Bill of Particulars or for a motion to make the Charge more definite and certain. It was purely a matter of discretion for the Commission as to whether or not it would require a Bill of Particulars. The document had been termed a " Bill of Particulars " for lack of any more appropriate term, but it was not in fact a bill of the kind signified when that term was used in courts of law in the United States. Its sole purpose was to specify the instances when the members of the command of the accused were permitted to commit acts contrary to the Laws of War. In other words, it referred back to and must be construed in the light of the Charge itself.

The Defence thereupon pointed out that the Commission, in allowing the Bill of Particulars to be filed, had stated that a Supplemental Bill might be

filed later, " subject to such conditions as the Commission may then specify." Counsel submitted that the normal, natural condition that would be specified in the filing of any Supplemental Bill of Particulars was that it should stay within the bounds of reason. The filing of nearly as many particulars as were contained in the first Bill he described as unconscionable. Defence Counsel could not agree that the two sets of opening words were materially the same, and claimed that the very essence of the case was the question of what must be established to prove an offence against the Laws of War, the four possible requirements being to show simply that an act was committed by someone under the command of a certain General, or that somebody permitted those acts, or that someone authorised them, or that someone ordered them.

The Commission rejected the Defence motion.

(vi) *Motion that the Prosecution Amplify the Particulars in Certain Ways*

The Defence next moved that particulars be furnished by the Prosecution, regarding each of the 59 new paragraphs, as to who granted permission to commit the alleged offences, to whom such permission was granted, the form of expression of the permission, and the times, places and dates of the giving of permission.

The Prosecutor replied that the Charge stated specifically that it was the accused who permitted these acts to be committed. Even in a United States Civil Court, the Prosecution would not be required to disclose their evidence through the medium of a Bill of Particulars, as was shown by the following passage from the judgment in the case of *Commonwealth* v. *Jordan*, 207 Massachusetts Reports 259 :

" The office of a Bill of Particulars is not to compel the Commonwealth to disclose its evidence but to give the defendant such information in addition to that contained in the complaint or indictment in regard to the crime with which he is charged, as law and justice require that he should have in order to safeguard his constitutional rights and to enable him to fully understand the crime with which he is charged and to prepare his defence."

The Prosecutor pointed out that the mention of " constitutional rights " made in this dictum constituted a reference to the Constitution of the United States, which in any case conferred no rights on the accused, an enemy alien. He thought that the details already provided in the Bills of Particulars met all of the requirements of justice and fair trial.

Defence Counsel's answer was that the Fifth Amendment of the Constitution of the United States applied to " any person," not " any citizen." Nevertheless, the Commission rejected the Defence motion.

(vii) *The First Motion for a Continuance*

The Defence then entered a motion requesting a recess of two weeks in order to enable the preparation of a case in answer to the 59 new allegations, to allow the Defence, for instance, so to acquaint themselves with the new

accusations as to place them in a position properly to cross-examine the Prosecution's witnesses. Counsel reminded the Commission that the Prosecution had expressed surprise when the Defence had stated, on 8th October, 1945, that they could properly prepare a defence in two weeks. Surely, if the Prosecution was surprised that the Defence could prepare a defence on 64 specifications in two weeks, Counsel did not think that they could now object to a recess of two weeks to prepare a defence for a similar number of specifications based on new facts, new places, new names and a new theory of the case.

Defence Counsel quoted the passage from paragraph 14 of the Commission's rules of procedure to which reference had already been made: " The accused shall be entitled . . . to have in advance of trial a copy of the Charges and specifications, so worded as clearly to apprise the accused of each offence charged." Counsel interpreted the action of the Commission on 8th October, in requiring the Prosecution to furnish a Bill of Particulars, as signifying that a Supplemental Bill should also be furnished " in advance of trial," and claimed that this phrase signified : " Sufficient time to allow the Defence a chance to prepare its defence."

The Prosecutor at this point began to urge again that the specifications were incorporated in the original charge, as he had claimed when the accused himself insisted that he had not been served with specifications ; but the President interrupted the Prosecutor and said that this point had been adequately discussed.

The Defence motion was rejected by the Commission, but the latter added that if, at the end of the presentation by the Prosecution of evidence concerning the Bill of Particulars as presented during the arraignment, Defence Counsel should believe that they required additional time to prepare their case, the Commission would consider such a motion at that time.

Defence Counsel then indicated, but without further result, that time was desired at once " as much, if not more " to prepare for cross-examination " as the Prosecutor's case goes in " as to prepare an affirmative defence.

(viii) *The Second Motion to Dismiss the Case*

The Defence then entered a motion to dismiss the case. Counsel first reminded the Commission that the previous motion to dismiss, made on the ground that the charge failed to state a violation of the Laws of War by the accused, was denied. The present motion was addressed to the Charge as supplemented by the original Bill of Particulars and by the Supplemental Bill of Particulars, and the claim was again made that it failed to set forth a violation of the Laws of War by the accused and that the Commission did not have jurisdiction to try the cause. It was the contention of Defence that the Bill of Particulars did not cure the defects of the Charge. On the contrary, it provided further reasons for allowing the motion.

The Bill of Particulars detailed sixty-four instances in which members of the accused's command were alleged to have committed war crimes. In no instance was it alleged that the accused committed or aided in the commission of a crime or crimes. In no instance was it alleged that the accused

issued an order, expressly or impliedly, for the perpetration of the crime or crimes charged. Nor was it alleged that the accused authorised the crimes prior to their commission or condoned them thereafter.

The Charge alleged that the accused failed in his duty to control his troops, permitting them to commit certain alleged crimes. The Bill of Particulars, however, set forth no instance of neglect of duty by the accused. Nor did it set forth any acts of commission or omission by the accused as amounting to a " permitting " of the crimes in question. What then was the substance of the Charge against the accused ? It was submitted by the Defence that, on the three documents now before the Commission, the Charge and the two Bills of Particulars, the accused was not accused of having done something or having failed to do something, but solely of having been something, namely commander of the Japanese forces. It was being claimed that, by virtue of that fact alone, he was guilty of every crime committed by every soldier assigned to his command.

American jurisprudence recognised no such principle so far as its own military personnel was concerned. The Articles of War denounced and punished improper conduct by military personnel, but they did not hold a commanding officer responsible for the crimes committed by his subordinates. No one would even suggest that the Commanding General of an American occupation force became a criminal every time an American soldier violated the law. It was submitted that neither the Laws of War nor the conscience of the world upon which they were founded would countenance any such charge. It was the basic premise of all civilised criminal justice that it punished not according to status but according to fault, and that one man was not held to answer for the crime of another.

It was an incontrovertible fact that the branding of military personnel as war criminals did not rest upon the mere fact of the command of troops, but rather upon the improper exercise of that command. This point was recognised officially by the War Department in its publication, *Rules of Land Warfare* (FM 27–10, Section 345, 1), which provided as follows: " Liability of Offending Individuals. Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."

There was nothing said in that provision concerning the Commanding General of a force being responsible, under the Laws of War, for any offences committed by members of his command without his sanction. Liability for war crimes was imposed on the persons who committed the crimes and on the officers who ordered the commission thereof. The war crime of a subordinate, committed without the order, authority or knowledge of his superior, was not a war crime on the part of the superior. The pleadings now before the Commission did not allege that the accused ordered, authorised or had knowledge of the commission of any of the alleged atrocities or war crimes. Without such an allegation, it was submitted, the cause must be dismissed as not stating an offence under the Laws of War.

The Defence claimed that if a violation of the Laws of War was not alleged, the Military Commission had no jurisdiction to hear the cause. In the " case of the saboteurs," *Ex parte Quirin*, decided in 1942, the judgment of the Supreme Court stated that: " Congress . . . has exercised its authority to define and punish offences against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offences which, according to the rules and precepts of the law of nations, and more particularly the Law of War, are cognisable by such tribunals. . . . We are concerned only with the question of whether it is within the constitutional power of the national government to place petitioners on trial before a military commission for the offences with which they are charged. We must therefore first inquire whether any of the acts charged is an offence against the Law of War cognisable before a military tribunal, and if so, whether the Constitution prohibits the trial."(1)

The Supreme Court found that the allegations contained in the charges against Quirin and his associates were offences within the Laws of War. Defence Counsel submitted that, had they found these allegations not related to offences against the Laws of War, the Supreme Court would have ruled that the military commission had no jurisdiction.

Defence Counsel maintained that there were two other grounds for the proposition that the Commission had no jurisdiction to try the case. The Commission was appointed by the Commanding General of Army Forces, Western Pacific, pursuant to authority delegated to him by the Commander-in-Chief, Army Forces, Pacific. The record did not, however, said Counsel, show any grant of authority from the President of the United States to the Commander-in-Chief, Army Forces, Pacific. Neither the Commander-in-Chief, Army Forces, Pacific, nor the Commanding General, Army Forces, Western Pacific, in the submission of the Defence, had authority to take the above-mentioned action. It was well settled that, in the absence of express statutory authority, a military commander had power to appoint a military commission only (*a*) as an exercise of martial law, (*b*) as an exercise of military government in occupied territory, or (*c*) as an incident of military operations during a period of hostilities. This principle was stated in Winthrop, *Military Law and Precedents*, on page 936.

There existed, said Counsel, neither martial law nor military government in the Philippines, and hostilities had ceased on or about 2nd September, 1945. There was no justification in law for the exercise by the Commander-in-Chief of the Army Forces, Pacific, of the extraordinary power by virtue of which the Commission was set up. The fundamental principle involved was apparently within the contemplation of the Commander-in-Chief, Army Forces, Pacific, when he issued the letter of 24th September, 1945, upon which the Commission based its authority, because paragraph 3 of his letter read as follows: " The Military Commissions established hereunder shall have jurisdiction over all Japan and all other areas occupied by the armed forces commanded by the Commander-in-Chief, Army Forces, Pacific." The Philippine Islands, Counsel pointed out, were not areas occupied by the armed forces. The above-mentioned letter, consequently, did not

(1) *Ex Parte Quirin et al*, 317 U.S.1, 1942.

grant authority to set up military commissions in the Philippine Islands ; and Special Orders No. 112, Headquarters, United States Army Forces, Western Pacific, dated 1st October, 1945, was therefore without authority.

Paragraph 271 of the War Department Basic Field Manual, *Rules of Land Warfare*, in its reprint of Article 42 of the Annex of the Hague Convention No. IV of 1907, said that : " A territory is considered occupied when it is actually placed under the authority of the hostile army." The United States was not and never had been a hostile army with respect to the Philippine Islands. The re-entry into the Philippine Islands in 1944 and 1945 had constituted a recovery of territory, not an occupation. From the date of re-entry on Philippine soil, General MacArthur had consistently affirmed and recognised the full governmental responsibility of the Philippine Commonwealth. This was evidenced by publications in the *Official Gazette*, April 1945, page 86 ; May 1945, pages 145 to 148 ; and September 1945, page 494. On 22nd August, 1945, General MacArthur issued the following proclamation : " Effective on 1st September, 1945, United States Army Forces in the Pacific shall cease from further participation in the self-administration of the Philippines, as such is no longer necessary."

Counsel claimed that if the projected trial should result in the conviction and sentence of the accused, such action would be subject to reversal, and made the following statement : " As officers of the United States Army, and as lawyers appointed to defend the accused, Defence Counsel are charged with a duty to the accused, to the Army, and to the people of the United States to pursue all proper legal remedies open to the Defence, including, if warranted, recourse to the Federal courts, and more particularly, the Supreme Court of the United States—citing again the Quirin case."

In his reply, the Prosecutor submitted that there was no reason for the Commission to reverse its previous decision of 8th October, 1945, to deny the motion to dismiss. The mere fact that a Bill of Particulars and a Supplemental Bill of Particulars had subsequently been presented to the Commission had no bearing upon the issue. In any case, it was beyond question that the Commission had no authority to dismiss this proceeding, It was under direct orders of the Commanding General, Army Forces, Western Pacific, to proceed with the trial of Tomoyuki Yamashita. The Letter Order of General MacArthur, as Commander-in-Chief of the United States Army Forces, Pacific, dated 24th September, 1945, and addressed to the Commanding General, United States Army Forces, Western Pacific, stated : " It is desired that you proceed immediately with the trial of General Tomoyuki Yamashita, now in your custody, for the crimes indicated in the attached charge." Special Orders No. 112, dated 1st October, 1945, being the Order of the Commanding General, Army Forces, Western Pacific, establishing the Military Commission and directing its proceedings, required that it should follow the provisions of the above-mentioned letter. The Prosecutor concluded, therefore, that the Commission had no authority to dismiss the case at this stage. It must try Tomoyuki Yamashita and, in order to accomplish that task, it must hear the Prosecution's case.

Called upon to offer his arguments in rebuttal, Defence Counsel claimed that, if the officer who gave the direction to try Tomoyuki Yamashita had

no jurisdiction to appoint a commission, he had no jurisdiction to order the trial of General Yamashita. The courts of the Commonwealth were open for any crimes which were committed by any member of the Japanese forces while they were in occupation of the Philippine Islands. He added that the present motion was not based on the Charge alone as had been the original motion to dismiss ; it was based on the Bill of Particulars and the Supplemental Bill, which did not state an offence against the Laws of War. The Defence had understood that the Bill of Particulars would cure the defects in the Charge but this had not been so.

The Commission rejected the second Defence motion to dismiss the case.

(ix) *A Question relating to the Status of the Accused*

The final motion put forward by the Defence before the Prosecutor's opening speech was one to cause the Prosecution to state for the record whether or not any notice had been given to the protecting power of the Japanese government concerning the trial of the case now before the Commission, in accordance with Article 60 of the Geneva Convention and paragraph 133 of Field Manual 27–10. The Prosecutor pointed out that Defence Counsel was basing his inquiry on the assumption that the accused was a prisoner-of-war. He claimed, however, that Yamashita was not before the Commission as a prisoner-of-war but as an alleged war criminal. The Prosecutor had therefore no objection to stating, for the benefit of the record, that so far as he knew, the United States of America had not given any notification, official notification, to the Government of Spain, the protecting power of Japan, that Tomoyuki Yamashita was being tried as a prisoner-of-war, for the reason that he was not being so tried. The Geneva Convention had no application to the case.

The President of the Commission then ruled that the request of the Defence Counsel had been adequately discussed by the Prosecution, within the limits of the information which would ordinarily be available, and requested the Prosecution to open its case.

(x) *Some Later Events Relating to the Preparation of the Defence*

This appears to be the most appropriate place to set out certain further requests for a continuance made by the Defence, and related events, which were referred to by Mr. Justice Rutledge in the course of his dissenting judgment on the motion and petition which Yamashita brought before the Supreme Court of the United States.[1]

On 29th October, 1945, near the end of the day's sittings, the President of the Commission interrupted the Prosecutor, who was about to call certain evidence relating to an item contained in the Supplemental Bill of Particulars, and stated that the Commission would not at that time listen to testimony or discussion on the item in question. In response to an inquiry by the Prosecution, the Defence indicated that it would require two weeks before it could proceed on the Supplemental Bill.

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(1) See p. 62.

On 2nd November, 1945, after the Commission had received an affirmative answer to its inquiry whether the Defence was ready to proceed with an item in the Supplemental Bill which the Prosecution proposed to prove, the President said to the Defence Counsel: " Hereafter, then, unless there is no (*sic*) objection by the Defence, the Commission will assume that you are prepared to proceed with any items in the Supplemental Bill." On 6th November, 1945, the Prosecution enquired when the Defence would be ready to proceed on certain further items in the Supplemental Bill, and the Prosecutor added: " Frankly, sir, it took the War Crimes Commission some three months to investigate these matters and I cannot conceive of the Defence undertaking a similar investigation with any less period of time." At this point, the President stated: " Let the Commission answer that. We realise the tremendous task which we placed upon the Defence and with which they are faced and it is our determination to give them the time they require. We ask that no time be wasted and we feel confident that you will not waste any, and we will see to it that you get time to prepare your defence."

On 12th November, 1945, the Commission announced that it would grant a continuance " only for the most urgent and unavoidable reasons." The Commission went on to question the need for all of the six officers representing the defence to be present during presentation of all the case, suggested that one or two would be adequate and others should be out of the court-room engaged in performing specific missions for Senior Counsel, and suggested bringing in additional Counsel, that " need to request continuance may not arise."

Finally, on 20th November, at the end of the presentation of the evidence for the Prosecution, the Defence moved for " a reasonable continuance." Counsel stated that during the time the court had been in session, the Defence had had no time " to prepare any affirmative defence," since they had had to work " day and night to keep up with the new Bill of Particulars."

The Commission denied the motion; in announcing its decision the President stated that in open session and in chambers the Commission had cautioned both Prosecution and Defence to so plan their preparation as to avoid the necessity of asking for a continuance, recalled the words used by the Commission on 12th November, and repeated that the Commission had, from an early point in the trial, from time to time invited the Defence to apply for the appointment of additional Counsel.

Counsel for the Defence then asked for " a short recess of a day." The Commission suggested a recess until 1.30 in the afternoon. Counsel responded this would not suffice. The Commission stated it felt " that the Defence should be prepared at least on its opening statement," to which Senior Counsel answered: " We haven't had time to do that, sir." The Commission then recessed until 8.30 the following morning.

6. THE OPENING ADDRESS FOR THE PROSECUTION

After repeating the Charge facing the accused and emphasising that the former alleged a disregard of his duty to control the members of his

command, the Prosecution made the following claim regarding General Yamashita's command:

"We will open our case with proof that the accused, Yamashita, was Commander of the Army Forces in the Philippines during the period stated in the charge—that is to say, from 9th October, 1944, to the time of surrender, September 1945; that in addition he commanded, as a part of those forces, or attached thereto, the so-called 'Kempei Tai', or military police. We will show also that he had overall command of the prisoner-of-war camps and civilian internment camps, labour camps, and other installations containing prisoners of war and other internees in all the Philippine Islands.

"We will show that his area or territory of command included all of the Philippine Islands, the entire area so known. We will show that at times he also commanded Navy forces and air forces, particularly when engaged as ground troops."

The Prosecutor then set out the essence of the case against the accused, in the following words:

"We will then show that various elements, individuals, units, organisations, officers, being a part of those forces under the command of the accused, did commit a wide pattern of widespread, notorious, repeated, constant atrocities of the most violent character; that those atrocities were spread from the northern portion of the Philippine Islands to the southern portion; that they continued, as I say, repeatedly throughout the period of Yamashita's command; that they were so notorious and so flagrant and so enormous, both as to the scope of their operation and as to the inhumanity, the bestiality involved, that they must have been known to the accused if he were making any effort whatever to meet the responsibilities of his command or his position; and that if he did not know of those acts, notorious, widespread, repeated, constant as they were, it was simply because he took affirmative action not to know. That is our case."

The Prosecutor made the following statement on the legal nature of the Commission and on the question of the applicability of the United States Articles of War(1) to its proceedings:

"Furthermore, sir, the Articles of War do not apply to this Commission in any particular. It is so ruled by the Judge Advocate-General, and if the Commission or Defence so desires I will be glad to supply a copy of that recent ruling. The Articles of War are not binding upon, do not apply to this Commission.

"This Commission, sir, is not a judicial body; it is an executive tribunal set up by the Commander-in-Chief—more specifically, the Commanding General, AFWESPAC—for the purpose of hearing the evidence on this charge, and of advising him, along with the Commander-in-Chief of the Army Forces of the Pacific, as to the punishment, in the event that the Commission finds the charge to be sustained. It is an executive body, and not a judicial body."

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(1) See pp. 44-6 and 63-9.

7. THE OPENING ADDRESS FOR THE DEFENCE

Before introducing evidence, the Defence made a short opening statement summarising the facts which they hoped to prove, and making the following claims in particular :

" Defence will show that the accused never ordered the commission of any crime or atrocity ; that the accused never gave permission to anyone to commit any crimes or atrocities ; that the accused had no knowledge of the commission of the alleged crimes or atrocities ; that the accused had no actual control of the perpetrators of the atrocities at any time that they occurred, and that the accused did not then and does not now condone, excuse or justify any atrocities or violation of the laws of war.

" On the matter of control we shall elaborate upon a number of facts that have already been suggested to the Commission in our cross-examination of the Prosecution's witnesses :

1. That widespread, devastating guerilla activities created an atmosphere in which control of troops by high ranking officers became difficult or impossible.

2. That guerilla activities and American air and combat activities disrupted communications and in many areas destroyed them altogether, making control by the accused a meaningless concept. And

3. That in many of the atrocities alleged in the Bill of Particulars there was not even paper control ; the chain of command did not channel through the accused at all. . . .

" You will see the picture of a General working under terrific pressure and difficulty, subject to last-minute changes in tactical plans ordered from higher headquarters, and a man who when he arrived in Luzon actually had command over less than half of the ground troops in the Island."

8. THE EVIDENCE BEFORE THE COMMISSION

As the President of the Commission pointed out,(1) the latter heard 286 witnesses and also accepted as evidence 423 exhibits of various kinds.

(i) *The Evidence for the Prosecution*

The evidence brought before the Commission established hundreds of incidents which included the withholding of medical attention from, and starvation of, prisoners of war and civilian internees, pillage, the burning and destruction of homes and public buildings without military necessity, torture by burning and otherwise, individual and mass execution without trial, rape and murder, all committed by members of the Japanese forces under the command of accused. These offences were widespread as regards both space and time.

By and large, the Defence did not deny that troops under the command of the accused had committed these various atrocities, and it is not therefore

(1) See pp. 33-4.

proposed to summarise in these pages the testimony and documents which were placed before the Commission regarding these offences.

By stipulation, it was agreed that the accused was from 9th October, 1944, to 3rd September, 1945, Commanding General of Japanese 14th Army Group, including the Kempei Tei, or Military Police in the Philippine Islands ; this stipulation was received in evidence.

Apart from claiming that the widespread nature of the offences described above must lead inevitably to the conclusion that they were planned by Yamashita, in view of his position of command, the Prosecution also produced evidence purporting more directly to show that the accused was implicated in the offences charged. This evidence is summarised in the following paragraphs.

Colonel Masatoski Fujishige, of the Japanese Army, testified that troops under his command had operated in the Batangas Islands and part of the Laguna Province after 1st January, 1945. His commander was Lt.-General Yokoyama ; the latter, stated the witness, probably " might have " come under Yamashita's command. Masatoski admitted having instructed certain officers and non-commissioned officers under his orders to kill all who oppose the Emperor with arms, even women and children ; he had had orders to expedite the clearing of his area of guerrillas.

Narciso Lapus stated that he had been private secretary to the Philippine General Artemio Ricarte, who had supported and worked for the Japanese during their occupation of the Philippine Islands. During the period from October 1944 and 31st December, 1944, Ricarte maintained contact with Yamashita as Commander-in Chief of the Japanese forces in the Philippines. Ricarte told the witness that Yamashita, as the highest commander of the Japanese forces in the Philippines, had control over the army the navy and the air force. Four or five days after Yamashita arrived in the Philippines, Ricarte had a conversation with him, and on returning to his house, the latter told Lapus that Yamashita had issued a general order to all the commanders of the military posts in the Philippine Islands " to wipe out the whole Philippines, if possible," and to destroy Manila, since everyone in the Islands were either guerrillas or active supporters of the guerrillas ; wherever the population gave signs of favouring the Americans the whole population of that area should be exterminated. Yamashita subsequently rejected Ricarte's plea that he should withdraw these orders.

Joaquin Galang, who claimed to have been a friend of Ricarte, stated that in December 1944, Yamashita visited Ricarte, and the former rejected Ricarte's request that the order to kill all Philippine inhabitants and destroy Manila be revoked ; speaking through Ricarte's grandson as interpreter, Yamashita said : " An order is an order, it is my order, and because of that it should not be broken or disobeyed."

Hideo Nishiharu, who had been head of the Judge Advocate Section in the Headquarters of Yamashita in the Philippines, stated that on 14th December, 1944, he advised the accused that a large number of persons suspected of being guerrillas were in custody and that there was no time for trial. He suggested that the question of their punishment be left to military tribunal officers co-operating with the Military Police. Yamashita, said

the witness, " offered no suggestions. He just nodded " and Nishiharu took this to signify assent. About 600 persons were thereupon executed without trial other than investigation by two officers.

Richard Sakakida stated that he had been an interpreter in the office of Yamashita's Judge Advocate. He testified that in the case of offences by Filipino civilians and Americans, an investigation was made by the Japanese Military Police (Kempei Tai) and the record thereof was sent to the Court Martial Department ; the Judge Advocate assigned to the case and the Chief Judge Advocate would then decide on the verdict and sentence in advance of the trial. During December 1944, trial consisted merely in the accused signing his name and giving his thumb-print, in reading the charge to him and in sentencing him. In the event of death sentence being passed, the victim was not informed of this until arrival at the cemetery. In one week in December 1944, cases involving about 2,000 Filipinos accused of being guerrillas were so handled in Yamashita's headquarters. If Japanese soldiers were tried, however, witnesses for the accused were allowed to testify, and the accused was told of any death sentence at the time of trial. Japanese soldiers were tried and convicted of rape, but the witness could remember no convictions after October 1944.

Fermin Miyasaki, a Filipino citizen who had been employed by the Japanese Military Police as an interpreter, described the various methods of torture used by the " Cortabitarte Garrison " (the Southern Manila Branch of the Military Police) during the period October to December 1944, on civilians suspected of being guerrillas or guerrilla sympathisers ; the witness then went on to state that in December 1944, Yamashita commended the Garrison in writing for their work " in suppressing guerrilla activities."

The Prosecution put in as evidence a certificate signed by Mr. James F. Byrnes, Secretary of State of the United States of America, under date of 26th October, 1945, which included the following words :

> " I further certify that, in response to proposals made by the Government of the United States through the Swiss Minister in Tokyo, the Swiss Minister telegraphed on 30th January, 1942, that the ' Japanese Government has informed me : ". . . Although not bound by the Convention relative treatment prisoners of war Japan will apply *mutatis mutandis* provisions of that Convention to American prisoners of war in its power." ' "

Filemon Castillejos, a Filipino, after describing the killing of three American prisoners of war by Japanese troops belonging to General Tajima's garrison, said that a Japanese Captain, a lieutenant and two soldiers had told him that the victims were killed because there was a telegram from Yamashita to General Tajima ordering that all the American prisoners in the Philippines be killed.

Paul Hennesen, a United States national who had been a prisoner of war in the Philippines, described how an American civilian internee, at the prison camp commandant's order, had been shot without trial while lying wounded on the guard-house floor. When protest was made by the internees, the commandant stated that he had had orders from Imperial Headquarters in Manila to shoot persons attempting to escape.

(ii) *The Evidence for the Defence*

The following paragraphs set out the essential facts placed before the Commission by the Defence.

Denhichi Okoochi, who had been Supreme Commander of the naval forces in the Philippines, stated that he transferred to Yamashita tactical command of the navy land troops in Manila on 5th January, 1945, and that the accused retained this command until 24th August, 1945. The witness retained " administrative control " over these forces, that is to say control over " such things as personnel, supplies and so forth " but not the operational control, which was in Yamashita's hands.

Bislumino Romero, grandson of General Ricarte, stated that Galang was not stating the truth when he testified that Romero interpreted a conversation between Ricarte and Yamashita in the former's house ; he never interpreted any statement of the accused that " all Filipinos are guerrillas and even the people who are supposed to be under Ricarte," and the witness's grandfather had never made to Yamashita in the witness's presence any request that Yamashita should revoke an order to kill all Filipinos and destroy Manila.

Shizus Yokoyma, previously a Lieutenant-General in the Japanese Army under Yamashita, stated that the latter had issued no orders to him for the killing of Filipino citizens or the destruction of property in Manila. The accused had warned him to be fair in all his dealings with the Filipino people. Yamashita had no power to discipline, promote, demote or remove members of the naval land forces.

Photostatic copies of parts of the issues of *Manila Tribune* for 4th, 17th and 26th November, 1944, and 31st January, 1945, which were put in as evidence by the Defence, showed that General Ricarte was active in assisting the Japanese and urging the Filipinos to resist the Americans. Official documents were put in as tending to prove that the Prosecution witnesses Lapus and Galang had been collaborators during the Japanese occupation of the Philippines.

Lieutenant-General Muto, Chief of Staff for Yamashita, appeared for the Defence. He stated that Yamashita had commanded the 11th Area Army with the duty to defend the entire Philippine Islands. Morale in the army was low and preparations for the defence were inadequate when the accused took over this task. Lack of knowledge of the Islands and the separation of commands prohibited the correction of deficiencies, and efforts to bring the independent commands under Yamashita's control required several months of negotiation. The accused had wanted to withdraw from Manila altogether and to fight in the mountains, but lack of transportation and reluctance on the part of certain of his officers had prevented him from taking this step, despite the orders which he gave that evacuation should take place. Only 1,500 to 1,600 of Yamashita's troops were in Manila at the time of the battle ; they had orders to maintain order and to protect supplies. Yamashita had no authority over the others. The witness had never heard of any order by Yamashita that non-combatant civilians be killed and Manila destroyed. Yamashita never visited any of the prisoner-of-war camps in the Philippines, but his policy was that prisoners should

be treated in accordance with the Geneva Convention. Prisoners were to be fed according to the same standards as Japanese soldiers, but reduced rations were inevitable due to food shortages. After complaints had been made to Yamashita concerning Japanese military police methods, he succeeded in having the Military Police Commander removed by the authorities in Tokyo. The witness denied that Colonel Nishiharu, Yamashita's Judge Advocate, had reported that there were one thousand guerrillas in custody and that there was no time to try them. In December, 1944, the Shimbu Army had power to try all suspected guerrillas and impose death sentences.

Lieutenant-Colonel Ishikawa of Yamashita's headquarters staff, who had been in charge of supply after 27th September, 1944, and inspected prisoner and internee camps, also stated that the prisoners' food was similar to that of the Japanese soldiers. An order from Tokyo, that prisoners be treated in a friendly manner and that as much food as possible be left behind for them should the Americans approach, was passed on by Yamashita. The witness, on his trips to the camps at Santo Tomas, Bilibid and Fort McKinley, had heard no reports of cruelty or ill-treatment. The accused required that any complaints filed by American prisoners of war and civilian internees should be brought to his attention.

Lieutenant-General Koh, who had been Commanding General of Prison and Internment Camps in the Philippines under Yamashita, also claimed that prison camps were operated under orders from Tokyo in accordance with the provisions of the Geneva Convention. The food given to prisoners of war and internees was inadequate, but the Japanese were likewise on reduced rations. Yamashita did not inspect the camps.

This witness gave evidence regarding conditions in the camps tending to show that they were as high as they could be in the circumstances. Lieutenant-General Shiyoku Kou, who had been in charge of two prisoner-of-war camps and three civilian internment camps, and John Shizuo Ohaski, an employee in one of the camps, were also called and gave similar evidence for the Defence.

The accused himself gave sworn evidence. He stated that, on his assuming command of the 14th Area Army on 9th October, 1944, he had but few experienced officers and he was short of all supplies, including food and transport. At first there were over 30,000 troops in the Islands who were not under his orders. These included the naval land forces in Manila, and when he did achieve control over these it was for operational and not for disciplinary purposes. He had unsuccessfully ordered the evacuation of Manila. He denied issuing orders for ill-treatment or torture of captives or having had reports of such offences, and his policy was to treat prisoners of war in the same way as his own troops in matters such as food. He had ordered that armed guerrillas be suppressed and had left the methods to be used to the discretion of his commanders. He denied that his Judge Advocate had ever told him that a large number of guerrillas would have to be disposed of without trial, for lack of time. The Commanding Generals of the 35th and Shimbu Armies had authority to pass death sentences on American prisoners of war tried in their areas without referring

the matter to the accused. The accused admitted, nevertheless, that he was responsible to the Southern Army for seeing that the proper procedure was followed ; communications were cut, however, and he did not always know about details.

The accused admitted that prisoner-of-war and civilian internment camps were under his command and claimed that all death sentences passed in the 14th Army required his approval ; the death sentences passed on guerrillas which he had approved in the Philippines were not more than 44 in number.

9. THE TYPES OF EVIDENCE ADMITTED

As was indicated by the President of the Commission,[1] a wide variety of types of evidence was admitted during the course of the trial. A large number of objections were made by the Defence, not always unsuccessfully, to the admission of items of evidence, in particular to pieces of documentary evidence and to hearsay evidence.

When the case eventually came before the Supreme Court of the United States, Mr. Justice Rutledge, in his dissenting opinion,[2] referred to a series of events which it would be appropriate to describe at this point. On 1st November, 1945, the President of the Commission ruled that the latter was unwilling to receive affidavits without corroboration by witnesses on any item in the Bills of Particulars. On 5th November, however, the Commission reversed this ruling and affirmed its prerogative of receiving and considering affidavits or depositions, if it chose to do so, " for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony."

10. THE CLOSING ADDRESS FOR THE DEFENCE

Defence Counsel attacked the evidence of the Prosecution concerning some few of the alleged offences, but in general the Defence did not deny that the atrocities alleged by the Prosecution had actually taken place, and the principal aim of Counsel was to show that the accused was not legally responsible for these offences.

Great stress was placed on the difficulties which had faced the accused on his taking command of the 14th Army Group on 9th October, 1944. It was claimed that :

> " The 14th Army Group was subordinate to the Supreme Southern Command under Count Terauchi, whose headquarters was in Manila. The navy was under a separate and distinct command, subordinate only to the naval command in Tokyo. Subordinate to Count Terauchi's command, but parallel with the 14th Army Group, were the 4th Air Army, the 3rd Transport Command, and the Southern Army Communications Unit. Therefore, out of approximately 300,000 troops in

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[1] See pp. 33-4
[2] See pp. 60-1 and 62-3.

Luzon, only 120,000 were under General Yamashita's command. An acute shortage of food existed, and the Japanese army was exceedingly short in both motor transport and gasolene. The accused found that the general state of affairs in the 14th Army Group was very unsatisfactory. The Chief of Staff was ill, there were only three members of Kuroda's staff left in the headquarters, and the new members were not familiar with the conditions that existed in Luzon. The 14th Army Group was of insufficient strength to carry out the accused's mission, inasmuch as it was, in his opinion, about five divisions short of what would be required. His troops were of poor calibre and not physically up to standard requirements. The morale of his men was poor. In addition, a strong anti-Japanese feeling existed among the Filipino population. Preparations for defence were practically non-existent. . . .

" To unify the 14th Command, General Yamashita requested that 30,000 troops under the Southern Command be transferred to him. This was accomplished in the early part of December. The 4th Air Army came under his command on 1st January, 1945, the 3rd Maritime Transport Command came under his command during the period 15th January to 15th February of this year. The navy never came under his command, but the naval troops in the City of Manila came under the command of the 14th Army Group on 6th January for tactical purposes during landing operations only.

" This limited command . . . involved the right to order naval troops to advance or to retreat, but did not include the command of such things as personnel, discipline, billeting or supply. . . .

" After the American victory on Leyte, the Japanese situation on Luzon became extremely precarious. The American blockade became more and more effective ; the shortage of food became critical. The American air force continually strafed and bombed the Japanese transportation facilities and military positions. General Yamashita, charged specifically with the duty of defending the Philippines, a task that called for the best in men and equipment, of which he had neither, continued to resist our army from 9th October to 2nd September of this year, at which time he surrendered on orders from Tokyo.

" The history of General Yamashita's command in the Philippines is one of preoccupation and harassment from the beginning to the end."

The Defence maintained that the Manila atrocities were committed by the naval troops, and that these troops were not under General Yamashita's command. How, it was asked, could he be held accountable for the actions of troops which had passed into his command only one month before, at a time when he was 150 miles away—troops whom he had never seen, trained or inspected, whose commanding officers he could not change or designate, and over whose actions he had only the most nominal control ?

In the submission of the Defence no kind of plan was discernible in the Manila atrocities : " We see only wild, unaccountable looting, murder and rape. If there be an explanation of the Manila story, we believe it lies in this : Trapped in the doomed city, knowing that they had only a few days at best to live, the Japanese went berserk, unloosed their pent-up fears and passions in one last orgy of abandon."

It was pointed out that General Yamashita arrived in Manila on 9th October and left on 26th December. Until 17th November, General Yamashita was not even the highest commander in the City of Manila since his immediate superior, Count Terauchi, was there and in charge. It was Count Terauchi and not General Yamashita who was handling affairs concerning the civilian population, relations with the civil government and the discouragement and suppression of anti-Japanese activities. The crucial period, therefore, was from 17th November to 26th December, a matter of a mere five weeks, during which General Yamashita was in Manila and in charge of civilian affairs. Could it be seriously contended that a commander who was beset and harassed by the enemy and was staggering under a successful enemy invasion to the south and expecting at any moment another invasion in the north could in such a short period gather in all the strings of administration ? Even so, the accused took some steps in an attempt to curb the activities of the Japanese military police who were terrorising the civilian population.

Regarding the charges alleging the killings of prisoners of war, the submission of the Defence, in essence, was that Yamashita had not been shown to have known of, condoned, excused, permitted or ordered them ; sometimes there was no proof even of them having been committed by troops under his command.

The rest of the allegations as to prisoner-of-war camps had to do with treatment and, for the most part, the question of insufficient food. The Defence rested their argument in this connection on the seriousness of the general food situation in the Philippine Islands, which was aggravated by the United States offensive. The Defence claimed that the evidence had shown that, despite this situation, the prisoners of war got rations equal to those of the Japanese soldiers. The accused had done all he could to alleviate the food situation in the civilian internee and prisoner-of-war camps, and far from ordering all American prisoners of war executed, or ordering any prisoners of war executed, General Yamashita's orders were to turn them over to the American forces at the earliest available time.

The main submissions of the Defence relating to the military police and guerrilla situation in Manila were: first, that guerrillas were, in the eyes of International Law, subject to trial and execution if caught ; second, that International Law did not prescribe the manner or form of trial which must be given ; third, that the suspected guerrillas held in Manila in December, 1944, were tried in accordance with the provisions of Japanese military law and regulations ; fourth, that General Yamashita never ordered or authorised any deviation from the provisions of Japanese military law and regulations ; fifth, that the fact that the method of trial prescribed by Japanese military law and regulations is a summary one and not in accord with Anglo-Saxon conceptions of justice was immaterial, since International Law did not prescribe any special method of trial, and in no event were Japanese methods of trial provided by Japanese law the fault or responsibility of the accused.

The explanation for many of the atrocities alleged by the Prosecution was to be found in the activities of the Philippine guerrilla movement which did great damage to the Japanese position. However admirable its members might be as fearless fighters, they were, in Japanese eyes, criminals, and the

Japanese had every right under International Law to try and execute them as such. Any civilian who took up arms against the Japanese was, in the eyes of International Law, guilty of war treason, just as any Japanese in Tokyo who might now take up arms against the United States would be a war traitor and subject to the death sentence. The evidence regarding the treatment of the Philippine guerrillas on capture was confused but it seemed that there was first an investigation by a military police investigating officer; then a consultation or conference by the judge advocate's department; and finally a form of trial, which had much less importance and formality than the hearing in the judge advocate's department. The evidence indicated that Japanese methods of trial and procedure were foreign to the American standards of justice. It had been shown in the witness box, however, that these methods were used not only in the case of civilians accused of guerrilla activities, but also in the case of Japanese soldiers accused of purely military offences. In neither case was there a right to counsel; in neither case were witnesses called. In both cases the decision of the court was based on the facts developed in the military police investigation held before trial. Furthermore, the methods of trial used were substantially those required by Japanese military law and regulations. As war criminals, guerrillas were liable to execution and there was an equal right on the part of the occupant to take stern methods to exterminate them. If captured, they were not entitled to any of the rights of a prisoner of war. There would certainly have to be proof that the person captured was a guerrilla, or was aiding the guerrillas, and this implied the holding of a trial. The Prosecution had alleged many executions without trial, but the Defence submitted that in practically all of these cases there was at least a semblance of an investigation. The Defence had claimed that because General Yamashita was a prisoner of war, his trial should follow at least the rules laid down by the *Manual for Courts Martial*, but the Prosecution had taken the position that General Yamashita, as an accused war criminal, was not entitled to the rights of a prisoner of war and that those rules need not apply. The same should apply, *a fortiori*, to guerrillas, argued the Defence, because a guerrilla was never a prisoner of war.

The allegations concerning punitive expeditions that included the execution of small children or other persons who were not guerrillas were a different matter, but there had been no testimony that General Yamashita ever ordered or permitted or condoned or justified or excused in any way these atrocities. All of the testimony had been to the contrary. In relation to the guerrillas, however, the Defence submitted that General Yamashita did precisely what he should have done under the circumstances. He issued an order in which he directed action against armed guerrillas, but was careful to say " armed", and at the same time he informed his chiefs-of-staff " to handle the Filipinos carefully, to co-operate with them and to get as much co-operation as possible from the Filipino people."

The Defence anticipated that the Prosecution would claim that there were so many of these atrocities, that they covered so large a territory, that General Yamashita must have known about them. The reply of the Defence was that, in the first place, a man was not convicted on the basis of what someone thought he must have known but on what he has been proved beyond reasonable doubt to have known; and in the second place, General

Yamashita did not know and could not have known about any of these atrocities.

Practically all of the atrocities took place at times when and in areas where the communication of news of such matters was practically impossible. Further, the accused's orders were clear: to attack armed guerrillas and to befriend and win the co-operation of other civilians. When atrocities occurred, they were committed in violation of General Yamashita's orders, and it was quite natural that those who violated these orders would not inform him of their acts.

The accused had himself explained why he knew nothing of the various alleged atrocities. He had pointed out that he was constantly under attack by large American forces, and had said:

> " Under these circumstances I had to plan, study and carry out plans of how to combat superior American forces, and it took all of my time and effort.
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> " At the time of my arrival I was unfamiliar with the Philippine situation, and nine days after my arrival I was confronted with a superior American force. Another thing was that I was not able to make a personal inspection and to co-ordinate the units under my command. . . . It was impossible to unify my command, and my duties were extremely complicated.
>
> " Another matter was that the troops were scattered about a great deal and the communications would of necessity have to be good, but the Japanese communications were very poor. . . .
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> " Reorganisation of the military force takes quite a while, and these various troops, which were not under my command, such as the Air Force and the Third Maritime Command . . . were gradually entering the command one at a time, and it created a very complicated situation. . . . Under the circumstances I was forced to confront the superior U.S. forces with subordinates whom I did not know and with whose character and ability I was unfamiliar.
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> " Besides this I put all my effort to get the maximum efficiency and the best methods in the training of troops and the maintaining of discipline, and even during combat I demanded training and maintenance of discipline. However, they were inferior troops, and there simply wasn't enough time to bring them up to my expectations. . . .
>
> " We managed to maintain some liaison, but it was gradually cut off, and I found myself completely out of touch with the situation. I believe that under the foregoing conditions I did the best possible job I could have done. However, due to the above circumstances, my plans and my strength were not sufficient to the situation, and if these things happened they were absolutely unavoidable."

The Defence submitted that General Yamashita's problem was not easy. He was harassed by American troops, by the guerrillas, and even by conflicting and unreasonable demands of his superiors. He had no time to inspect prisoners; all he could do about the guerrilla situation was to give orders to suppress armed combatant guerrillas and befriend and co-operate with other civilians, and to trust his subordinates to carry out his orders.

Defence Counsel pointed out that the evidence of the Prosecution related almost exclusively to the proof of the atrocities alleged in the Bills

of Particulars. A minute fraction thereof attempted to impute to General Yamashita the knowledge of the commission of the atrocities and, in a few instances, the ordering of the commission of the atrocities.

The evidence of Lapus,(1) a collaborator during the Japanese occupation, had tended to show General Yamashita as having ordered the massacre of civilians and the destruction of the City of Manila, but his evidence had been full of inconsistencies. Galang, (2) another collaborator, testified that in a conversation General Ricarte said to General Yamashita, through Ricarte's grandson as interpreter: "I would like to take this occasion to ask you again to revoke the order to kill all of the Filipinos and to destroy all of the city," and that General Yamashita answered: "An order is an order; it is my order. It should not be broken or disobeyed." Yet the grandson(3) had testified that he had not interpreted the conversation alleged to have taken place between his grandfather and General Yamashita in the presence of Galang. The evidence of Castillegos(4) was valueless hearsay. Counsel for the Defence submitted that there was no credible testimony in the entire record of trial which in any manner supported any contention that General Yamashita had ordered or had actual knowledge of the commission of any of the atrocities set forth in the Bills of Particulars. Without knowledge of the commission or the contemplated commission of the offences, General Yamashita could not have permitted the commission of the atrocities. The Defence did not deny the commission of atrocities by Japanese troops, but the fact that atrocities were committed did not prove that General Yamashita had knowledge of the commission thereof; nor could knowledge be inferred therefrom under the conditions which existed during the period in which the atrocities were committed.

Under adverse combat conditions, with the myriad of problems which had to be solved in fighting a losing battle, neither General Yamashita or the members of his staff could or would have time for any duties other than those of an operational nature and could not, and did not, know of the commission of the acts set forth in the Bills of Particulars by troops whose imminent and inevitable death turned them into battle-crazed savages. Nor was General Yamashita or the members of his staff chargeable with any dereliction of duty in not learning of these occurrences.

The evidence adduced by the Prosecution, therefore, did not establish that either General Yamashita or his headquarters issued orders directing the commission of the atrocities set forth in the Bills of Particulars; nor did it establish that General Yamashita or his headquarters had any knowledge thereof, permitted the commission thereof, or that under the circumstances then existing General Yamashita unlawfully disregarded and failed to discharge his duty as the Commanding General of the 14th Area Army in controlling the operations of the members of his command, thereby permitting them to commit the atrocities alleged.

The only possible basis for imputing to General Yamashita any criminal responsibility for the commission of these atrocities was provided by his status as the Commanding General of some of the troops involved in the commission thereof.

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(1) See p. 19. (2) See p. 19. (3) See p. 21. (4) See p. 20.

The United States did not recognise a criminal responsibility based upon the status of an individual as a Commanding General of troops, but did recognise the criminal liability attached to a Commanding General for the improper exercise of that command. The United States had defined the criminal liability of individuals offending against the Laws of War in the War Department Publication, *Rules of Land Warfare*, FM 27–10, Section 345. 1, wherein criminal liability was defined and limited to individuals and organisations who violated the accepted laws and customs of war.

Under this section, the liability for war crimes was imposed on the persons who committed them and on the officers who ordered the commission thereof. The war crime of a subordinate, committed without the order authority or knowledge of the superior officer, was not the war crime of the superior officer.

Not only was there no proof of the criminal responsibility of General Yamashita for the alleged offences ; witnesses for the Defence had testified that no orders directing or authorising the commission of the alleged acts were issued by General Yamashita or by his headquarters, that no reports of any of the acts were received by General Yamashita or his headquarters, that under the circumstances General Yamashita and the members of his staff were absorbed in the duties incident to combat to the exclusion of other duties normally performed by an army headquarters, and that the proper functioning of General Yamashita and his staff officers was complicated by enemy action, disabling and destruction of supply lines, lines of communication and motor equipment, the lack of gas and oil for the operation of the vehicles which were not damaged, and the consequent impossibility to keep advised of the administrative functioning of his command.

General Yamashita, testifying as a witness in his own behalf, had denied that he issued any orders directing the commission of any act of atrocity, that he received any report of the commission of such acts, that he had any knowledge whatsoever of the commission of such acts, that he permitted such acts to be perpetrated, or that he condoned the commission of such acts.

11. THE CLOSING ADDRESS FOR THE PROSECUTION

The Prosecution claimed that the principal contentions as between the Defence and the Prosecution were as to whether or not the accused failed to perform a duty which he owed as commander of armed forces in the Philippines, and as to whether or not such a failure would constitute a violation of the Laws of War.

The accused had acknowledged that he was under a duty under International Law to control his troops so that they would not commit wrongful acts, that if commanding officer ordered, permitted or condoned the crime which was committed by his troops or his subordinate, then that commanding officer would be subject to criminal punishment under the military law of Japan, and that if he took all possible means to prevent the crime committed by his troops or his subordinate, and yet that crime was committed, then the commanding officer, despite all of the efforts which he made, would bear administrative responsibility to his superiors.

The Prosecution underlined the fact that so far as the Laws of War were concerned there was no such distinction between criminal responsibility and administrative responsibility. If an act constituted a violation of the laws of war the death penalty might be assessed irrespective of whether or not under the military laws of the nation involved or in civil law there would or would not be a criminal responsibility.

The evidence had shown that the accused became to all intents and purposes after the 17th November, 1944, the military governor of the Philippine Islands. He was the highest military commander in this area. It was his duty, in addition to his duty as a military commander, to protect the civilian population. Whereas Defence Counsel had referred to the atrocities as having been committed by " battle-crazed men under the stress and strain of battle," there was in fact evidence that in many instances those acts were committed under the leadership of commissioned officers. That is quite a far cry from the sudden breaking of bounds of restraint by individuals on their own initiative. The submission of the Prosecution was that the evidence showed that these atrocities were carefully planned, carefully supervised ; they were in fact commanded.

The Prosecution recalled that the accused had asserted that he had no knowledge of these acts, and that if he had had knowledge or any reason to forsee these acts he would have taken affirmative steps to prevent them. In explanation of his claim that he had no knowledge he had asserted that his communications were faulty. The Prosecution submitted however that there was nothing in the record to the effect that the accused did have adequate communications. For instance, the accused had acknowledged that reports from Batangas concerning guerrilla activity were received from time to time. Even if it were accepted that the accused did not know of what was going on in Batangas, the fact remained that he did not make an adequate effort to find out. It was his duty to know what was being done by his troops under his orders. The accused had pleaded that he was too hard pressed by the enemy to find out what was the state of discipline among his troops. The Prosecution claimed however that the performance of the responsibility of the commanding officer toward the civilian populations is as heavy a responsibility as the combating of the enemy. And if he chose to ignore one and devote all of his attention to the other he did so at his own risk.

The accused had made no special attempt to find what the prevailing conditions were in the prison camps under his control, and many of the atrocities against the civilian population were committed very close to his headquarters. The accused had testified that he did not inquire as to the methods being pursued by the military police. He issued orders for the release of certain unfortunate captives upon the approach of United States troops, but only because he knew he was defeated and wanted to improve his record.

He had also acknowledged that he knew that prisoners of war were being made to work on airfields or on airfield installation. In response to questions he had stated that, in his opinion, airfield work was entirely in accordance with International Law, so long as the airfield was not under

attack. The Prosecution claimed, however, that it was a violation of the Geneva Convention for those men to work on that airfield at all.

Turning to the food situation, the Prosecutor claimed that the evidence showed that according to the observation and the personal knowledge of internees the Japanese garrison at each of those camps actually were getting better food and more food than were the internees.

There was no evidence that the accused ordered the executions of certain prisoners of war which had been proved. The executions were, however, carried out by men under his command. The very method by which those executions were accomplished, the complete disregard of the prescribed procedure, showed that those men were acting under approval. Otherwise they would never have dared to be so arbitrary.

Many thousands of unarmed women and children had been butchered in Manila and in Batangas, and they could not be considered guerrillas. They were given no trial, and their killing was carried out by military men acting as military units, and led by officers, non-commissioned and commissioned. These massacres were not done in the heat of battle. More than 25,000 people, over a period of more than a month, were massacred in a methodical obviously planned way and, as the evidence indicated very strongly, under the orders of General Fujisige, the Commanding Officer in the Batangas area. The Prosecution claimed that the accused must be held responsible for these atrocities in view of the wide and general nature of the order which he issued for the prompt subjugation of armed guerrillas. The Prosecutor claimed that: " He knew the guerrilla activity. He knew that his troops were being harassed. He gave them an order which naturally under the circumstances would result in excesses, in massacres, in devastation, unless the order were properly supervised. He unleashed the fury of his men upon the helpless population, and apparently, according to the record, made no subsequent effort to see what was happening or to take steps to see to it that the obvious results would not occur—not a direct order, but contributing necessarily, naturally and directly to the ultimate result."

Whatever the procedures of the courts martial under Yamashita may have been, he had acknowledged that he made no effort to determine what those courts martial were doing. He had stated that no American prisoner of war was tried by court martial. But he could not possibly know one way or the other because, as he had said, he received no reports from them. The same applied with respect to trials by military tribunals of civilian internees.

A suspected guerrilla was not afforded any particular type of trial under International Law. There must, however, be a trial, and the minimum requirements of a trial would be knowledge of the charges, an opportunity to defend, and a judicial determination of guilty or innocence on the basis of the evidence. In fact, if the Military Police saw fit to decide that a person was to be killed, that person did not go to a court martial ; he was executed by the Military Police. General Yamashita had denied that he had ever given the Military Police authority to carry out death sentences, or authority to try and assess death sentences ; and yet, according to the testimony of the interpreter at the Cortabitarte garrison headquarters that was the

practice of the Military Police. If Yamashita did not know of it, that was his fault. There was no question that the Military Police were directly under the command of Yamashita ; he had acknowledged that to be so.

Yamashita had claimed that the naval troops in Manila were only under his tactical command, but General Muto had acknowledged that any officer having command of troops of another branch under him did have the authority and duty of restraining those men from committing wrongful acts. The atrocities committed by these naval troops were not the acts of irresponsible individuals, acting according to a whim or while in a drunken orgy ; nor were they usually committed in the heat of battle. They were acting under officers, sometimes in concert with officers. Obviously, their acts constituted a deliberate, planned enterprise.

The Prosecutor admitted that the application of the Laws of War to a commanding officer who fails to control his troops had not frequently been attempted. Nevertheless, he submitted that it was well recognised in International Law, even under the international conventions, that a commanding officer did have a duty to control his troops in such a way that they did not commit widespread, flagrant, notorious violations of the laws of war. He repeated that since there had existed in the Philippines a widespread pattern of atrocities over a period of time, necessarily notorious and committed by organised military units led by officers, there must have been a failure on the part of the ultimate commander of those troops to perform his duty so to control those troops that they would not commit such acts.

The Prosecutor argued that, since Yamashita had acknowledged that he did command an army composed of lawful belligerents, then Article 1 of the Hague Convention made him responsible for the acts of his subordinates.(1) This was true also under the common usages of war. Further, claimed the Prosecutor : " The criminal laws, the customs, the laws generally of civilised nations, are construed to apply in the international field as a part of the Laws of War as well, wherever they bear any relation at all," and " under laws generally, any man who, having the control of the operation of a dangerous instrumentality, fails to exercise that degree of care which under the circumstances should be exercised to protect third persons, is responsible for the consequences of his dereliction of duty. We say, apply that in this case ! Apply that in the field of military law. It is applied by international tribunals or claims commissions with respect to claims for pecuniary damages by individuals or governments against individuals of another government, or against other governments, arising out of illegal acts. There are many cases where, under International Law, a government of one nation—or let us say a nation has been held financially responsible because of the wrongful acts of its agents or representatives, military or otherwise, with consequent injuries to the nationals of other countries. There is nothing to prevent the application of that same principle in the law of war on a criminal basis."

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(1) " The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions :

" 1. To be commanded by a person responsible for his subordinates." "

The Prosecution regarded the present case to be a clear case, in the international field, of criminal negligence. Wharton's *Criminal Evidence*, Volume I, Section 88, stated that a person " is not supposed to have known the facts of which it appears he was ignorant ; but if his ignorance is negligent or culpable . . . then his ignorance is no defence." A similar principle had been applied in the field of International Law. For instance, Borchard, *Diplomatic Protection*, page 217, stated that : ". . . the failure of a government to use due diligence to prevent a private injury is a well recognised ground of international responsibility." The Prosecutor continued : " Now, if it is proper and permissible under International Law and the Laws of War to apply to an entire government, an entire nation, civil responsibility in the form of damages for wrongful actions, violations of Laws of War by the agents or the representatives of that nation, is there any reason under the sun why a responsibility, criminal or civil, under the Laws of War, might not properly be applied under the proper circumstances in the proper case to an individual. The Defence cries that Yamashita was too far away from the scene of battle, too far removed from the actual perpetrators, justly to be charged and punished for the crimes of those under him. Yet, his very government, his entire nation may legally be held responsible—even farther removed from the perpetrators and from the scene of the crime." The analogy of liability under municipal law for the specific crime of manslaughter was also used by the Prosecution.

Moore's *International Law Digest*, Volume VI, page 919, stated that ". . . It is true that soldiers sometimes commit excesses which their officers cannot prevent ; but in general, a commanding officer is responsible for the acts of those under his orders. Unless he can control his soldiers, he is unfit to command them." The Prosecution concluded that if Yamashita could not control his troops, it was his duty to mankind, to say nothing of his duty to his country to inform his superiors of that fact so that they might have taken steps to relieve him. There was no evidence that he did that.

12. THE VERDICT AND SENTENCE

The findings of the Commission were delivered on 7th December, 1945.

The President of the Commission, after repeating the charge and summarising the offences contained in the Bills of Particulars,(1) pointed out that it was "noteworthy that the accused made no attempt to deny that the crimes were committed, although some deaths were attributed by Defence Counsel to legal execution of armed guerrillas, hazards of battle and action of guerrilla troops favourable to Japan."

The President made the following remarks concerning the evidence which had been received :

> " The Commission has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw. They included doctors and nurses ; lawyers, teachers, businessmen ; men and women of religious orders ; prisoners of war and civilian internees ; officers of the United States Army ;

(1) See p. 4.

officers of the Japanese Army and Navy ; Japanese civilians ; a large number of men, women and children of the Philippines ; and the accused. Testimony has been given in eleven languages or dialects. Many of the witnesses displayed incredible scars of wounds which they testified were inflicted by Japanese from whom they made miraculous escapes followed by remarkable physical recovery. For the most part, we have been impressed by the candour, honesty and sincerity of the witnesses whose testimony is contained in 4055 pages in the record of trial.

" We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, the United States State Department, and the Commonwealth of the Philippines ; affidavits ; captured enemy documents or translations thereof ; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers."

The President then went on to set out what may be regarded as the essential facts of the case as follows :

" The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused. Captured orders issued by subordinate officers of the accused were presented as proof that they, at least, ordered certain acts leading directly to exterminations of civilians under the guise of eliminating the activities of guerrillas hostile to Japan. With respect to civilian internees and prisoners of war, the proof offered to the Commission alleged criminal neglect, especially with respect to food and medical supplies, as well as complete failure by the higher echelons of command to detect and prevent cruel and inhuman treatment accorded by local commanders and guards. The Commission considered evidence that the provisions of the Geneva Convention received scant compliance or attention, and that the International Red Cross was unable to render any sustained help. The cruelties and arrogance of the Japanese Military Police, prison camp guards and officials, with like action by local subordinate commanders were presented at length by the Prosecution.

" The Defence established the difficulties faced by the accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organisation, equipment, supply with especial reference to food and gasolene, train communication, discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defence contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service. As to the crimes themselves, complete ignorance that

they had occurred was stoutly maintained by the accused, his principal staff officers and subordinate commanders, further, that all such acts, if committed, were directly contrary to the announced policies, wishes and orders of the accused. The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted."

The Judgment of the Commission was delivered by the President in the following words:

" This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The *Rules of Land Warfare*, Field Manual 27–10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such cases. These matters have been the principal considerations of the Commission during its deliberations.

" General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

" Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging."

13. AN APPEAL FOR CLEMENCY

Five of the Counsel who had defended Yamashita addressed to the Appointing Authority, and to General MacArthur as Confirming Authority, a request that the verdict of guilty be disapproved, and as an alternative a recommendation for clemency.

They submitted that even were it a fact that the atrocities were not sporadic in nature but were supervised by Japanese officers and non-commissioned officers, these supervised cases were scattered over the entire area of the Philippine Islands and there was no evidence that the officers or non-commissioned officers who were responsible therefore reported these acts to General Yamashita. The second and basic conclusion of the Commission([1]) indicated that its members agreed that the fact that in some instances there was a supervision by Japanese officers and non-commissioned officers did not warrant a conclusion that General Yamashita had ordered or directed the commission of such acts or that he had any knowledge that such acts had been or were being committed.

The second conclusion made it apparent that the death sentence was adjudged for an offence that did not include any criminal intent, any specific intent, or any *mens rea*. At its worst, the offence stated by the Commission was simply unintentional ordinary negligence. The sentence of hanging was grossly disproportionate for such an offence.

The recommendation continued :

" The Commission said *inter alia* :

" ' Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted.'

It is respectfully submitted that even though this be accepted as a fact, no General Officer commanding any army is to be held criminally liable and hanged for the customs and procedure inherent in that army simply because that standard of customs and procedure in the American Army."

The plea went on to claim that :

" The first duty of an officer in any army is to accomplish the mission assigned to him. This General Yamashita attempted to do, concentrating most of his time and the time of the members of his staff on the countless operational matters involved in the accomplishment of his mission, and thereby, of necessity, relegating administrative functions within his command to a secondary role."

It was submitted that, under those circumstances, Yamashita " did not fail to exercise control of his troops to the extent that he was criminally negligent in the performance of his duty."

After pointing out that much of the evidence against the accused consisted of " hearsay evidence, opinion evidence, and *ex parte* affidavits," and

([1]) That during the period in question the accused " failed to provide effective control of (his) troops as was required by the circumstances."

claiming that the cumulative effect was prejudicial to the substantial rights of the accused, the plea went on to claim that the prosecution did not introduce any direct evidence whatsoever to show that the accused had issued orders for the commission of the alleged atrocities, nor that he had received any reports from any subordinate officers, or from any other sources, that such alleged atrocities had been or were being committed; nor that he had had any knowledge that such alleged atrocities had been or were being committed. Having no knowledge of the commission of the alleged atrocities, the accused could not have permitted the commission thereof as alleged in the charge, and the Commission in its conclusion indicated that it found no such permission.

It was maintained that: "This is the first time in the history of the modern world that a commanding officer has been held criminally liable for acts committed by his troops. It is the first time in modern history that any man has been held criminally liable for acts which according to the conclusion of the Commission do not involve criminal intent or even gross negligence. The Commission therefore by its findings created a new crime."

This plea was rejected by the Appointing and Confirming Authorities and the findings of the Military Commission confirmed.

14. PETITION TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

Yamashita, on being sentenced, petitioned the Supreme Court of the Philippine Islands for a writ of habeas corpus, but this Court after hearing argument, denied the petition on the ground, among others, that its jurisdiction was limited to an inquiry as to the jurisdiction of the Commission to place petitioner on trial for the offence charged, and that the Commission, being validly constituted by the order of General Styer, had jurisdiction over the person of petitioner and over the trial for the offence charged.

The decision of the Court is not here analysed at length, since there is available the decision of the Supreme Court of the United States, to which Yamashita had recourse on the failure of his petition to the Supreme Court of the Philippines.

15. PETITION TO THE SUPREME COURT OF THE UNITED STATES

The case was brought before the Supreme Court of the United States on a petition for writs of habeas corpus and prohibition in that Court, and on a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines, denying the petitioner's application to the Court for writs of habeas corpus and prohibition. The opinion of the Court, rejecting Yamashita's petition and application, was delivered by Chief Justice Stone on 4th February, 1946. Dissenting judgments were read by Mr. Justice Murphy and Mr. Justice Rutledge.(1) The issues raised and the opinions expressed were of the highest legal importance in relation to war crimes and the trial of those accused of committing them.

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(1) Mr. Justice Jackson took no part in the consideration of this case.

I. CHIEF JUSTICE STONE (MAJORITY OPINION)[1]

(i) *The Problems Before the Supreme Court*

After summarising the history of the trial before the Military Commission, Chief Justice Stone set out the problems facing the Supreme Court, in the following words:

" The petitions for habeas corpus set up that the detention of petitioner for the purpose of the trial was unlawful for reasons which are now urged as showing that the military commission was without lawful authority or jurisdiction to place petitioner on trial, as follows:

(*a*) That the military commission which tried and convicted petitioner was not lawfully created, and that no military commission to try petitioner for violations of the Law of War could lawfully be convened after the cessation of hostilities between the armed forces of the United States and Japan;

(*b*) that the charge preferred against petitioner fails to charge him with a violation of the Law of War;

(*c*) that the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the Commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the Commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War (10 U.S.C., ss. 1496, 1509) and the Geneva Convention (47 Stat. 2021), and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment;

(*d*) that the Commission was without authority and jurisdiction in the premises because of the failure to give advance notice of petitioner's trial to the neutral power representing the interests of Japan as a belligerent as required by Article 60 of the Geneva Convention, 47 Stat. 2021, 2051.

On the same grounds the petitions for writs of prohibition set up that the Commission is without authority to proceed with the trial."

(ii) *The Sources and Nature of the Authority to Create Military Commissions to Conduct War Crime Trials*

After referring to the previous decision of the Supreme Court of the Philippine Islands, Chief Justice Stone continued:

" In *Ex parte Quirin*, 317 U.S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offences against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, s. 8, Cl. 10 of the Constitution to ' define and punish . . . Offences against the Law of Nations . . .', of which the Law of War is a part, had by the Articles of War (10 U.S.C., ss. 1471–1593) recognised the ' military commission ' appointed by military command, as it had previously existed in United States Army

[1] The cross headings appearing in the following pages for the most part do not appear in the text of the judgments dealt with, but have been inserted for the convenience of the reader.

practice, as an appropriate tribunal for the trial and punishment of offences against the Law of War. Article 15 declares that ' the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offences that by statute or by the Law of War may be triable by such military commissions . . . or other military tribunals.' See a similar provision of the Espionage Act of 1917, 50 U.S.C., s. 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions ' any other person who by the Law of War is subject to trial by military tribunals,' and who, under Article 12, may be tried by court martial, or under Article 15 by military commission.

" We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the Law of War by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the pre-existing jurisdiction of military commissions created by appropriate military command, all offences which are defined as such by the Law of War, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognised and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis Powers were parties.

" We also emphasised in *Ex parte Quirin,* as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the Commission to try the petitioner for the offence charged. In the present cases it must be recognised throughout that the military tribunals which Congress has sanctioned by the Articles of War, are not courts whose rulings and judgments are made subject to review by this Court. See *Ex parte Vallandingham,* 1 Wall. 243 ; *In re Vidal,* 179 U.S. 126 ; cf. *Ex parte Quirin, supra* 39. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power ' to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty.' 28 U.S.C., ss. 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorised to review their decisions. See *Dynes* v. *Hoover,* 20 How. 65, 81 ; *Runkle* v. *United States,* 122 U.S. 543, 555–556 ; *Carter* v. *McClaughry,* 183 U.S. 365 ; *Collins* v. *McDonald,* 258 U.S. 416. Cf. *Matter of Moran,* 203 U.S. 96, 105.

" Finally, we held in *Ex parte Quirin, supra*, 24, 25, as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offences against the law of war had recognised the right of the accused to make a defence. Cf. *Ex parte Kawato*, 317 U.S. 69. It has not foreclosed their right to contend that the Constitution of laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."

Before turning to the consideration of the several contentions urged to establish want of authority in the Commission, Chief Justice Stone pointed out that: " We are not here concerned with the power of military commissions to try civilians. See *Ex parte Milligan*, 4 Wall. 2, 132 ; *Sterling* v. *Constantin*, 287 U.S. 378 ; *Ex parte Quirin, supra*, 45. The Government's contention is that General Styer's order creating the Commission conferred authority on it only to try the purported charge of violation of the law of war committed by petitioner, an enemy belligerent, while in command of a hostile army occupying United States territory during time of war."

(iii) *The Authority to Create the Military Commission Which Tried Yamashita*

Chief Justice Stone continued :

" Our first inquiry must therefore be whether the present Commission was created by lawful military command and, if so, whether authority could thus be conferred on the Commission to place petitioner on trial after the cessation of hostilities between the armed forces of the United States and Japan.

" General Styer's order for the appointment of the Commission was made by him as Commander of the United States Army Forces, Western Pacific. His command includes, as part of a vastly greater area, the Philippine Islands, where the alleged offences were committed, where petitioner surrendered as a prisoner of war, and where, at the time of the order convening the Commission, he was detained as a prisoner in custody of the United States Army. The Congressional recognition of military commissions and its sanction of their use in trying offences against the law of war to which we have referred, sanctioned their creation by military command in conformity to long established American precedents. Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court martial, as was General Styer, who had been vested with that power by order of the President. 2 Winthrop, Military Law and Precedents, 2nd ed., 1302 ; cf. Article of War 8.

" Here the Commission was not only created by a commander competent to appoint it, but his order conformed to the established policy of the Government and to higher military commands authorising his action. In a proclamation of 2nd July, 1942 (56 Stat. 1964), the President proclaimed that enemy belligerents who, during time of war, enter the United States, or any territory possession thereof, and who

violate the Law of War, should be subject to the Law of War and to the jurisdiction of military tribunals. Paragraph 10 of the Declaration of Potsdam of 6th July, 1945, declared that '. . . stern justice shall be meted out to all war criminals including those who have visited cruelties upon prisoners,' U.S. Dept. of State Bull., Vol. XIII, No. 318, pp. 137–138. This Declaration was accepted by the Japanese Government by its note of 10th August, 1945. U.S. Dept. of State Bull., Vol. XIII, No. 320, p. 205.

" By direction of the President, the Joint Chiefs of Staff of the American Military Forces, on 12th September, 1945, instructed General MacArthur, Commander-in-Chief, United States Army Forces, Pacific, to proceed with the trial, before appropriate military tribunals, of such Japanese war criminals ' as have been or may be apprehended.' By order of General MacArthur of 24th September, 1945, General Styer was specifically directed to proceed with the trial of petitioner upon the charge here involved. This order was accompanied by detailed rules and regulations which General MacArthur prescribed for the trial of war criminals. These regulations directed, among other things, that review of the sentence imposed by the Commission should be by the officer convening it, with ' authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed,' and directed that no sentence of death should be carried into effect until confirmed by the Commander-in-Chief, United States Army Forces, Pacific.

" It thus appears that the order creating the Commission for the trial of petitioner was authorised by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offences against the Law of War committed by enemy combatants."

(iv) *The Question Whether the Authority to Create the Commission and Direct the Trial by Military Order Continued after the Cessation of Hostilities*

The majority opinion of the Supreme Court on this question was as follows :

" An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the Law of War. *Ex parte Quirin*, *supra*, 28. The trial and punishment of enemy combatants who have committed violations of the Law of War is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognised by the Law of War. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed. See *United States* v. *Anderson*, 9 Wall. 56, 70 ; *The Protector*, 12 Wall. 700, 702 ; *McElrath* v. *United States*, 102 U.S. 426, 438 ; *Kahn* v. *Anderson*, 255 U.S. 1, 9–10. The war power, from which the Commission derives its existence, is not limited to victories in the field, but carries with it

the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognised, the evils which the military operations have produced. See *Stewart* v. *Kahn*, 11 Wall. 493, 507.

" We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the Law of War committed before their cessation, at least until peace has been officially recognised by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the Law of War would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

" No writer on International Law appears to have regarded the power of military tribunals, otherwise competent to try violations of the Law of War, as terminating before the formal state of war has ended.(1) In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offences against the Law of War committed before the cessation of hostilities.(2)

" The extent to which the power to prosecute violations of the Law of War shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the Law of War. The conduct of the trial by the military commission has been authorised by the political branch of the Government, by military command, by International Law and usage, and by the terms of the surrender of the Japanese Government."

(v) *The Question Whether the Charge Against Yamashita Failed to Allege a Violation of the Laws of War*

Chief Justice Stone observed that: " Neither Congressional action nor the military orders constituting the Commission authorised it to place petitioner on trial unless the charge preferred against him is of a violation of the Law of War."

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(1) A footnote to this part of the judgment states : " The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the Law of War could be tried by military tribunals. See Report of the Commission, 9th March, 1919, 14 American Journal of International Law 95, 121. See also memorandum of American commissioners concurring on this point, id., at p. 141. The treaties of peace concluded after World War I recognised the right of the Allies and of the United States to try such offenders before military tribunals. See Art. 228 of Treaty of Versailles, 28th June, 1919 ; Art. 173 of Treaty of St. Germain, 10th September, 1919 ; Art. 157 of Treaty of Trianon, 4th June, 1920.

" The terms of the agreement which ended hostilities in the Boer War reserved the right to try, before military tribunals, enemy combatants who had violated the Law of War. 95 British and Foreign State Papers (1901-1902) 160. See also trials cited in Colby, War Crimes, 23 Michigan Law Review 482, 496-7."

(2) " See cases mentioned in *Ex parte Quirin*, *supra*, p. 32, note 10, and in 2 Winthrop, *supra*, 1310-1311, n. 5 ; 14 Op. A.G. 249 (Modoc Indian Prisoners)."

The Chief Justice then quoted the charge, made reference to the Bills of Particulars, and went on to say:

" It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognised in International Law as violations of the Law of War. Articles 4, 28, 46 and 47, Annex to Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306–7. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by ' permitting them to commit ' the extensive and widespread atrocities specified. The question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations ofthe Law of War and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the Prosecution at the opening of the trial.

" It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the Law of War to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the Law of War presupposes that its violations is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

" This is recognised by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfil in order to be accorded the rights of lawful belligerents, that it must be ' commanded by a person responsible for his subordinates.' 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders-in-chief of the belligerent vessels ' must see that the above Articles are properly carried out.' 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it ' the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, [of the Convention] as well as for unforeseen cases.' And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, ' shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

" These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognised, and its breach penalised by our own military tribunals.(1) A like principle has been applied so as to impose liability on the United States in international arbitrations. *Case of Jenaud,* 3 Moore, International Arbitrations, 3000 ; *Case of 'The Zafiro,'* 5 Hackworth, Digest of International Law, 707.

" We do not make the Laws of War but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the Commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances. We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the Law of War detailed in the Bill of Particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the Commission and were for it to decide. See *Smith* v. *Whiting, supra,* 178. It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the Commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the Law of War and to pass upon its sufficiency to establish guilt.

" Obviously charges of violations of the Law of War triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. *Collins* v. *McDonald, supra,* 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately alleges a violation of the Law of War and that the Commission had authority to try and decide the issue which it raised. Cf. *Dealy* v. *United States,* 152 U.S. 539 ; *Williamson* v. *United States,* 207 U.S. 425, 447 ; *Classer* v. *United States,* 315 U.S. 60, 66, and cases cited."

(vi) *Articles 25 and 38 of the United States Articles of War and the Provisions of the Geneva Prisoners of War Convention Regarding Judicial Suits Not Applicable to Trials of Alleged War Criminals*

The Chief Justice recalled that " the regulations prescribed by General MacArthur governing the procedure for the trial of petitioner by the Commission directed that the Commission should admit such evidence ' as in

(1) " Failure of an officer to take measures to prevent murder of an inhabitant of an occupied country committed in his presence. Gen. Orders No. 221, Hq. Div. of the Philippines, 17th August, 1901. And in Gen. Orders No. 264, Hq. Div. of the Philippines, 9th September, 1901, it was held that an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had ' the power to prevent ' it."

its opinion would be of assistance in proving or disproving the charge, or such as in the Commission's opinion would have probative value in the mind of a reasonable man,' and that in particular it might admit affidavits, depositions or other statements taken by officers detailed for that purpose by military authority."

The Judgment continued :

" The petitions in this case charged that in the course of the trial the Commission received, over objection by petitioner's counsel, the deposition of a witness taken pursuant to military authority by a United States Army captain. It also, over like objection, admitted hearsay and opinion evidence tendered by the Prosecution. Petitioner argues as ground for the writ of habeas corpus, that Article 25(1) of the Articles of War prohibited the reception in evidence by the Commission of depositions on behalf of the Prosecution in a capital case, and that Article 38(2) prohibited the reception of hearsay and of opinion evidence.

" We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the Law of War. Article 2 of the Articles of War enumerates ' the persons . . . subject to these articles ' who are denominated, for purposes of the Articles, as ' persons subject to military law.' In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them. Articles 12, 13 and 14, before the adoption of Article 15 in 1916, made all ' persons subject to military law ' amenable to trial by courts martial for any offence made punishable by the Articles of War. Article 12 makes triable by general court martial ' any other person who by the Law of War is triable by military tribunals.' Since Article 2, in its 1916 form, includes some persons who, by the Law of War, were, prior to 1916, triable by military commission, it was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles 12, 13 and 14 to try such persons before courts martial might be construed to deprive the non-statutory military commission of a portion of what was considered to be its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles. It declared that ' The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offences that . . . by the Law of War may be triable by such military commissions.'

(1) Article 25 provides : " A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, . . . *Provided,* That testimony by deposition may be adduced for the defence in capital cases."

(2) Article 38 provides : " The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognised in the trial of criminal cases in the district courts of the United States : *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed : . . . "

" By thus recognising military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common Law of War. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognised but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common Law of War. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

" Petitioner further urges that by virtue of Article 63 of the Geneva Convention 1929, 47 Stat. 2052, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. Article 63 provides : ' Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.' Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them to be applied in the trial of petitioner. But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence ' pronounced against a prisoner of war ' for an offence committed while a prisoner of war, and not for a violation of the Law of War committed while a combatant.

" Article 63 of the Convention appears in part 3, entitled ' Judicial Suits,' of Chapter 3, ' Penalties Applicable to Prisoners of War,' of Section V, ' Prisoners' Relations with the Authorities,' one of the sections of Title III, ' Captivity.' All taken together relate only to the conduct and control of prisoners of war while in captivity as such. Chapter 1 of Section V, Article 42, deals with complaints of prisoners of war because of the conditions of captivity. Chapter 2, Articles 43 and 44, relates to those of their number chosen by prisoners of war to represent them.

" Chapter 3 of Section V, Articles 45 through 67, is entitled ' Penalties Applicable to Prisoners of War.' Part 1 of that chapter, Articles 45 through 53, indicate what acts of prisoners of war, committed while prisoners, shall be considered offences, and defines to some extent the punishment which the detaining power may impose on account of such offences."

A footnote to the judgment here summarises these provisions as follows :

" Part 1 of Chapter 3, ' General Provisions,' provides in Articles 45 and 46 that prisoners of war are subject to the regulations in force in the armies of the detaining power, that punishments other than those provided ' for the same acts for soldiers of the national armies ' may not be imposed on prisoners of war, and that ' collective punishment for individual acts ' is forbidden. Article 47 provides that ' Acts constituting an offence against discipline, and particularly attempted escape, shall be verified immediately ; for all prisoners of war, commissioned or not, preventive arrest shall be reduced to the absolute minimum... Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit.... In all cases the duration of preventive imprisonment shall be deducted from the disciplinary or the judicial punishment inflicted.'

" Article 48 provides that prisoners of war, after having suffered ' the judicial or disciplinary punishment which has been imposed on them ' are not to be treated differently from other prisoners, but provides that ' prisoners punished as a result of attempted escape may be subjected to special surveillance.' Article 49 recites that prisoners ' given disciplinary punishment may not be deprived of the prerogatives attached to their rank.' Articles 50 and 51 deal with escaped prisoners who have been retaken or prisoners who have attempted to escape. Article 52 provides: ' Belligerents shall see that the competent authorities exercise the greatest leniency in deciding the question of whether an infraction committed by a prisoner of war should be punished by disciplinary or judicial measures. . . . This shall be the case especially when it is a question of deciding on acts in connection with escape or attempted escape. . . . A prisoner may not be punished more than once because of the same act or the same count.' "

The Judgment then goes on :

" Punishment is of two kinds—' disciplinary ' and ' judicial,' the latter being the more severe. Article 52 requires that leniency be exercised in deciding whether an offence requires disciplinary or judicial punishment. Part 2 of Chapter 3 is entitled ' Disciplinary Punishments,' and further defines the extent of such punishment, and the mode in which it may be imposed. Part 3, entitled ' Judicial Suits,' in which Article 63 is found, describes the procedure by which ' judicial ' punishment may be imposed. The three parts of Chapter 3, taken together, are thus a comprehensive description of the substantive offences which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offences, and of the procedure by which guilt may be adjudged and sentence pronounced.

" We think is clear, from the context of these recited provisions, that part 3, and Article 63 which it contains, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war. Section V gives no indication that this part was designed to deal with offences other than those referred to in parts 1 and 2 of Chapter 3.

" We cannot say that the Commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty or military command defining the Commission's authority. For reasons already stated we hold that the Commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of a military tribunal in admitting evidence, which Congress or controlling military command has directed to be excluded, may be drawn in question by petition for habeas corpus or prohibition."

(vii) *Effect of Failure to give Notice of the Trial to the Protecting Power*

The Chief Justice was able to deal with this question very rapidly, since part of the relevant argument had already been set out. His judgment read as follows :

" Article 60 of the Geneva Convention of 27th July, 1929, 47 Stat. 2051, to which the United States and Japan were signatories, provides that ' At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the Protecting Power thereof as soon as possible and always before the date set for the opening of the trial.' Petitioner relies on the failure to give the prescribed notice to the Protecting Power(1) to establish want of authority in the Commission to proceed with the trial.

" For reasons already stated we conclude that Article 60 of the Geneva Convention, which appears in part 3, Chapter 3, Section V, Title III of the Geneva Convention, applies only to persons who are subject to judicial proceedings for offences committed while prisoners of war."

The Judgment deals in a footnote with a possible counter-argument, as follows :

" One of the items of the Bill of Particulars, in support of the charge against petitioner, specifies that he permitted members of the armed forces under his command to try and execute three named and other prisoners of war, ' subjecting to trial without prior notice to a representative of the Protecting Power, without opportunity to defend, and without counsel ; denying opportunity to appeal from the sentence rendered ; failing to notify the Protecting Power of the sentence pronounced ; and executing a death sentence without communicating to the representative of the Protecting Power the nature and circumstances of the offence charged.' It might be suggested that if Article 60 is inapplicable to petitioner it is inapplicable in the cases specified, and

(1) " Switzerland, at the time of the trial, was the power designated by Japan for the protection of Japanese prisoners of war detained by the United States, except in Hawaii. U.S. Dept. of State Bull., Vol. XIII, No. 317, p. 125."

that hence he could not be lawfully held or convicted on a charge of failing to require the notice, provided for in Article 60, to be given.

" As the Government insists, it does not appear from the charge and specifications that the prisoners in question were not charged with offences committed by them as prisoners rather than with offences against the Law of War committed by them as enemy combatants. But apart from this consideration, independently of the notice requirements of the Geneva Convention, it is a violation of the Law of War on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defence. 2 Winthrop, *supra*, 434–435, 1241 ; Article 84, Oxford Manual ; U.S. War Dept., Basic Field Manual, *Rules of Land Warfare* (1940), par. 356 ; Lieber's Code, G.O. No. 100 (1863), Instructions for the Government of Armies of the United States in the Field, par. 12 ; Spaight, War Rights on Land, 462, n."

Further, pointed out the Judgment : " The Commission made no finding of non-compliance with the Geneva Convention. Nothing has been brought to our attention from which we could conclude that the alleged non-compliance with Article 60 of the Geneva Convention had any relation to the Commission's finding of a series of atrocities committed by members of the forces under petitioner's command, and that he failed to provide effective control of his troops, as was required by the circumstances ; or which could support the petitions for habeas corpus on the ground that petitioner had been charged with or convicted for failure to require the notice prescribed by Article 60 to be given."

II. DISSENTING JUDGMENT OF MR. JUSTICE MURPHY

(i) *Applicability of the Fifth Amendment to the United States Constitution to War Crime Trials and to the Yamashita Trial in Particular*(1)

Mr. Justice Murphy had no doubt that a United States Military Commission appointed to try alleged war criminals was bound to observe the procedural rights of an accused person as guaranteed by the United States Constitution, especially by the due process clause of the Fifth Amendment.

His opinion is stated in the following passage :

" The Fifth Amendment guarantee of due process of law applies to ' any person ' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy

(1) The Fifth Amendment to the United States Constitution, which was adopted on 15th December, 1791, runs as follows (Italics inserted) :

" No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law ;* nor shall private property be taken for public use, without just compensation."

> belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, colour or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. . . . They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances."

In Mr. Justice Murphy's opinion, " The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. . . . No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defence, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged."

Such a procedure was " unworthy of the traditions of " the United States people and possessed " boundless and dangerous implications " for the future, but " even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure."

(ii) *Extent of Review Permissible to the Supreme Court in Cases such as the Present*

Mr. Justice Murphy deemed it fortunate that the Supreme Court had rejected the argument that " restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review."

He did not feel that the Court " should be confined by the traditional lines of review drawn in connection with the use of the writ by ordinary criminals who have direct access to the judiciary in the first instance. Those held by the military lack any such access ; consequently the judicial review available by habeas corpus must be wider than usual in order that proper standards of justice may be enforceable."

For the purposes of the present case, however, Mr. Justice Murphy accepted " the scope of review recognised by the Court." As he understood it, the following issues in connection with war criminal trials were reviewable through the use of the writ of habeas corpus : (1) whether the military commission was lawfully created and had authority to try and to convict the accused of a war crime ; (2) whether the charge against the accused stated a violation of the Laws of War ; (3) whether the commission, in admitting certain evidence, violated any law or military command defining the commission's authority in that respect ; and (4) whether the commission lacked jurisdiction because of a failure to give advance notice to the protecting power as required by treaty or convention.

(iii) *The Question Whether the Charge against Yamashita had Stated a Recognised Violation of the Laws of War*

Mr. Justice Murphy agreed that the military commission was lawfully created in this instance and that petitioner could not object to its power to try him for a recognised war crime. He felt it impossible, however, to agree that the charge against the petitioner stated a recognised violation of the Laws of War.

After summarising the history of the United States offensive against Yamashita's troops, and pointing out that the Commission in its findings had itself noted the difficulties under which he had acted,[1] Mr. Justice Murphy pointed out that nowhere in the charge or in the Bills of Particulars, " was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command." " The findings of the military commission," he went on, " bear out this absence of any direct personal charge against the petitioner." The commission merely found that atrocities and other high crimes " have been committed by members of the Japanese armed forces under your command . . . that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers . . . that during the period in question you failed to provide effective control of your troops as was required by the circumstances."

Mr. Justice Murphy claimed that " read against the background of military events in the Philippines subsequent to 9th October, 1944, these charges amount to this : ' We, the victorious American forces . . . charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganisation which we ourselves created in large part.' " He expressed the view that " to use the very inefficiency and disorganisation created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality."

He continued : " International Law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault ; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations . . . .The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that International Law refuses to recognise such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance."

Mr. Justice Murphy then went on :

" The Court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague

(1) See p. 34.

Convention No. IV of 18th October, 1907, 36 Stat. 2277, 2295, to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are ' commanded by a person responsible for his subordinates,' has no bearing upon the problem in this case. Even if it has, the clause ' responsible for his subordinates ' fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on International Law. In Oppenheim, *International Law* (6th Edition rev. by Lauterpacht, 1940, vol. 2, p. 204, footnote 3) it is stated that ' The meaning of the word " responsible " . . . is not clear. It probably means " responsible to some higher authority," whether the person is appointed from above or elected from below ; . . . ' Another authority has stated that the word ' responsible ' in this particular context means ' presumably to a higher authority,' or ' possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts.' Wheaton, *International Law* (14th Edition, by Keith, 1944, p. 172, footnote 30). Still another authority, Westlake, *International Law* (1907, Part II, p. 61), states that ' probably the responsibility intended is nothing more than a capacity of exercising effective control.' Finally, Edwards and Oppenheim, *Land Warfare* (1912. p. 19, para. 22) state that it is enough ' if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority.' It seems apparent beyond dispute that the word ' responsible ' was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack ; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances.

' " The provisions of the other conventions referred to by the Court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of Hague Convention No. X, 36 Stat. 2371, 2389, nor Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV, 36 Stat. 2295, 2306, that the commander of a force occupying enemy territory ' shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that.

" Even the Laws of War heretofore recognised by this nation fail to impute responsibility to a fallen commander for excesses committed by his disorganised troops while under attack. Paragraph 347 of the War Department publication, *Basic Field Manual*, Rules of Land Warfare, FM 27-10 (1940), states the principal offences under the Laws of War

recognised by the United States. This includes all of the atrocities which the Japanese troops were alleged to have committed in this instance. Originally this paragraph concluded with the statement that ' The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.' The meaning of the phrase ' under whose authority they are committed ' was not clear. On 15th November, 1944, however, this sentence was deleted and a new paragraph was added relating to the personal liability of those who violate the Laws of War. Change, 1, FM 27-10. The new paragraph 345.1 states that ' Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished.' From this conclusion seems inescapable that the United States recognises individual criminal responsibility for violations of the Laws of War only as to those who commit the offences or who order or direct their commission. Such was not the allegation here. Cf. Article 67 of the Articles of War, 10 U.S.C., s. 1539."

Mr. Justice Murphy drew attention to numerous instances, especially with reference to the Philippine Insurrection in 1900 and 1901, where commanding officers were found to have violated the Laws of War by specifically ordering members of their command to commit atrocities and other war crimes, and to other cases where officers had been held liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power. In no recorded instance, however, had the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the Laws of War.

The United States Government had claimed that the principle that commanders in the field are bound to control their troops had been applied so as to impose liability on the United States in international arbitrations. The precedents quoted, however, related to arbitrations on property rights,(1) not to charges of war crimes ; even more significant was the fact that even these arbitration cases fail to establish any principle of liability where troops under constant assault and demoralising influences by attacking forces. The same observation applied to the common law statutory doctrine, referred to by the Government, that one who is under a legal duty to take protective or preventive action is guilty of criminal homicide if he wilfully or negligently omits to act and death is proximately caused.(2) Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different.

" Moreover," said Mr. Justice Murphy, " we are not dealing here with an ordinary tort or criminal action ; precedents in those fields are of little if

(1) *Case of Jeannaud* (1880), 3 Moor, International Arbitrations (1898) 3000 ; *Case of The Zafiro* (1910), 5 Hackworth, Digest of International Law (1943) 707.

(2) " *State* v. *Harrison,* 107 N.J.L. 213 ; *State* v. *Irvine,* 126 La. 434 ; Holmes, The Common Law, p. 278."

any value. Rather we are concerned with a proceeding involving an international crime."

The only conclusion which Mr. Justice Murphy could draw was " that the charge made against the petitioner is clearly without precedent in International Law or in the annals of recorded military history."

That did not mean " that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of International Law and recognised concepts of justice." The charge in the present case, however, " was speedily drawn and filed but three weeks after the petitioner surrendered. The trial proceeded with great dispatch without allowing the defence time to prepare an adequate case. Petitioner's rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification. All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part. Instead the loose charge was made that great numbers of atrocities had been committed and that petitioner was the commanding officer; hence he must have been guilty of disregard of duty. Under that charge the Commission was free to establish whatever standard of duty on petitioner's part that it desired. By this flexible method a victorious nation may convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review."

III. DISSENTING JUDGMENT OF MR. JUSTICE RUTLEDGE

(i) *Opening Remarks*

Mr. Justice Rutledge claimed that Yamashita's trial was a novelty in United States history, both legally and historically. There must be room in law for growth, but it was necessary for the judges to keep in view the traditions of the past, of which none was " older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether, citizens, aliens, alien enemies or enemy belligerents." Mr. Justice Rutledge expressed his view in these words: " With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command."

> " It is not in our tradition," continued Mr. Justice Rutledge, " for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place; (1) or in language not sufficient to inform him of the nature of the offence or to enable him to make defence.(2) Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown

(1) " *Cummings* v. *Missouri*, 4 Wall. 277; *Kring* v. *Missouri*, 107 U.S. 221."

(2) " *Armour Packing Co.* v. *United States*, 209 U.S. 56, 83-84 *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; cf. *Screws* v. *United States*, 325 U.S. 91. See . . ." (as pp. 59-60).

actively to have participated in knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so.

" It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defence ;(1) in capital or other serious crimes to convict on ' official documents . . . ; affidavits ; . . . documents or translations thereof ; diaries . . . , photographs, motion picture films and . . . newspapers '(2) or on hearsay, once, twice or thrice removed,(3) more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination.(4)

" Our tradition does not allow conviction by tribunals both authorised and bound(5) by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation ; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the credibility, probative value and admissibility of whatever may be tendered as evidence.

" The matter is not one merely of the character and admissibility of evidence. It goes to the very competency of the tribunal to try and punish consistently with the Constitution, the laws of the United States made in pursuance thereof, and treaties made under the nation's authority.

" All these deviations from the fundamental law, and others, occurred in the course of constituting the Commission, the preparation for trial and defence, the trial itself, and therefore, in effect, in the sentence imposed. Whether taken singly in some instances as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment's command that no person shall be deprived of life, liberty or property without due process of law, a trial so vitiated cannot withstand constitutional scrutiny."

The only basic protection accorded to the petitioner had been representation by able Counsel : yet this had lost much of its value because of the denial of reasonable opportunity for them to perform their function.

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(1) " *Hawk* v. *Olson*, No. 17, October Term, 1945, decided 13th November, 1945 ; *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 : " What may not be taken away is notice of the charge and an adequate opportunity to be heard in defence of it." See . . ." (as pp. 62-3).

(2) " The commission's findings state : " We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, the United States State Department, and the Commonwealth of the Philippines ; affidavits ; captured enemy documents or translations thereof ; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers."

Concerning the specific nature of these elements in the proof, the issues to which they were directed, and their prejudicial effects, see text *infra* and notes in . . ." (now pp. 57-62).

(3) " *Queen* v. *Hepburn*, 7 Cranch. 289 ; *Donnelly* v. *United States*, 228 U.S. 243, 273. See . . ." (as p. 61, note 2.)

(4) " *Motes* v. *United States*, 178 U.S. 471 ; *Paoni* v. *United States*, 281 Fed. 801. See . . ." (as pp. 57-63.)

(5) The judgment here made a cross-reference to the material now set out on page 58, note 1, and pages 60-1 and 62-3.

Mr. Justice Rutledge summed up his view as follows : " On this denial and the Commission's invalid constitution specifically, but also more generally upon the totality of departures from constitutional norms inherent in the idea of a fair trial, I rest my judgment that the Commission was without jurisdiction from the beginning to try or punish the petitioner and that, if it had acquired jurisdiction then, its power to proceed was lost in the course of what was done before and during trial."

The only hypothesis on which either of these conclusions be avoided was " that an enemy belligerent in petitioner's position is altogether beyond the pale of constitutional protection, regardless of the fact that hostilities had ended and he had surrendered with his country. The Government has so argued, urging that we are still at war with Japan and all the power of the military effective during active hostilities in theatres of combat continues in full force unaffected by the events of 14th August, 1945, and after.

" In this view the action taken here is one of military necessity, exclusively within the authority of the President as Commander-in-Chief and his military subordinates to take in warding off military danger and subject to no judicial restraint on any account, although somewhat inconsistently it is said this Court may ' examine ' the proceedings generally.

" As I understand the Court, this is in substance the effect of what has been done. For I cannot conceive any instance of departure from our basic concepts of fair trial, if the failures here are not sufficient to produce that effect."

Mr. Justice Rutledge's attitude to this argument was expressed in these words :

> " We are technically still at war, because peace has not been negotiated finally or declared. But there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures. The nation may be more secure now than at any time after peace is officially concluded. In these facts is one great difference from *Ex parte Quirin*, 317 U.S. 1. Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased or than they may after a treaty of peace is signed. Ample power there is to punish them or others for crimes, whether under the Laws of War during its course or later during occupation. There can be no question of that. The only question is how it shall be done, consistently with universal constitutional commands or outside thier restricting effects. In this sense I think the Constitution follows the flag.
>
> " The other thing to be mentioned in order to be put aside is that we have no question here of what the military might have done in a field of combat. There the maxim about the law becoming silent in the noise of arms applies. The purpose of battle is to kill. But it does not follow that this would justify killing by trial after capture or surrender, without compliance with laws or treaties made to apply in such cases, whether trial is before or after hostilities end."

The Judgment continues: " My basic difference is with the Court's view that provisions of the Articles of War and of treaties are not made applicable to this proceeding and with its ruling that, absent such applicable provisions, none of the things done so vitiated the trial and sentence as to deprive the Commission of jurisdiction."

Mr. Justice Rutledge expressed his agreement with the views of Mr. Justice Murphy with respect to the substance of the crime, and went on to state: ' My own primary concern will be with the constitution of the Commission and other matters taking place in the course of the proceedings, relating chiefly to the denial of reasonable opportunity to prepare petitioner's defence and the sufficiency of the evidence, together with serious questions of admissibility, to prove an offence, all going as I think to the Commission's jurisdiction," but, before proceeding to his first major topic, he claimed that " although it was ruled in *Ex parte Quirin, supra,* that this Court had no function to review the evidence, it was not there or elsewhere determined that it could not ascertain whether conviction is founded upon evidence expressly excluded by Congress or treaty; nor does the Court purport to do so now."

(ii) *The Range of Evidence Admitted*

Section 16 of the Regulations Governing the Trial of War Criminals, by which the directive of General MacArthur to General Styer(1) was accompanied, permitted, in the words of Mr. Justice Rutledge, reception of documents, reports, affidavits, depositions, diaries, letters, copies of documents, or other secondary evidence of their contents, hearsay, opinion evidence and conclusions, in fact of anything which in the Commission's opinion " would be of assistance in proving or disproving the charge," without any of the usual modes of authentication.(2)

The learned Judgment continues:

> " A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the Commission a law unto itself.

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(1) See pp. 2-3.

(2) " 16. Evidence.—(*a*) The Commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the Commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the Commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the Commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents, if the Commission believes that the original is not available or cannot be produced without undue delay. . . ."

" It acted accordingly. As against insistent and persistent objection to the reception of all kinds of ' evidence,' oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the Commission not only consistently ruled against the defence, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified,(1) reprimanded counsel for continuing to make objection, declined to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favourable to the defence, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumour, report, at first, second, third or further hand, written, printed or oral, and one ' propaganda ' film were allowed to come in, most of this relating to atrocities committed by troops under petitioner's command throughout the several thousand islands of the Philippine Archipelago during the period of active hostilities covered by the American forces' return to and recapture of the Philippines.

" The findings reflect the character of the proof and the charge. The statement quoted above(2) gives only a numerical idea of the instances in which ordinary safeguards in reception of written evidence were ignored. In addition to these 423 ' exhibits,' the findings state the Commission ' has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw. . . .' "

(iii) *The Question of the Accused's Knowledge*

Mr. Justice Rutledge's judgment continues :

" But there is not a suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents, with the exception of the wholly inferential suggestion noted below. Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had knowledge, or that the Commission so found, are in the statement that ' the crimes *alleged to have been permitted* by the accused in violation of the Laws of War may be grouped into three categories ' set out below,(3) in the further statement that

(1) " In one instance the president of the Commission said : ' The rules and regulations which guide this Commission are binding upon the Commission and agencies provided to assist the Commission. . . . We have been authorised to receive and weigh such evidence as we can consider to have probative value, and further comments by the Defence on the right which we have to accept this evidence is decidedly out of order.' But see note 19." (At present set out on pages 60-1.)

(2) See p. 55, note 2.

(3) " Namely, ' (1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war ; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives ; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offences extended throughout the period the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended through the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon.' "

'the Prosecution presented evidence to show that the crimes were so extensive and so widespread, both as to time and area, that *they must* either have been *wilfully permitted* by the accused, *or secretly ordered* by' him; and in the conclusion of guilt and the sentence.([1]) (Emphasis added.) Indeed the Commission's ultimate findings draw no express conclusion of knowledge, but state only two things: (1) the fact of widespread atrocities and crimes; (2) that petitioner 'failed to provide effective control . . . as required by the circumstances.'

"This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects the very gist of the offence, whether that was wilful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part *to discover* this and take whatever measures he then could to stop the conduct.

"Although it is impossible to determine from what is before us whether petitioner in fact has been convicted of one or the other or of both these things, the case has been presented on the former basis and, unless as is noted below there is fatal duplicity, it must be taken that the crime charged and sought to be proved was only the failure, with knowledge, to perform the commander's function to control, although the Court's opinion nowhere expressly declares that knowledge was essential to guilt or necessary to be set forth in the charge."

In a footnote to these paragraphs, Mr. Justice Rutledge pursues the point further:

"The charge, set forth at the end of this note, is consistent with either theory—or both—and thus ambiguous, as were the findings. See note([1]) below .The only word implying knowledge was 'permitting.' If 'wilfully' is essential to constitute a crime or charge of one, otherwise subject to the objection of 'vagueness,' cf. *Screws* v. *United States*, 325 U.S. 91, it would seem that 'permitting' alone would hardly be sufficient to charge 'wilful and intentional' action or omission; and, if taken to be sufficient to charge knowledge, it would follow necessarily that the charge itself was not drawn to state and was insufficient to support a finding of mere failure to detect or discover the criminal conduct of others.

([1]) "In addition the findings set forth that captured orders of subordinate officers gave proof that 'they, at least,' ordered acts 'leading directly to' atrocities; that 'the *proof offered* to the Commission *alleged* criminal *neglect* . . . as well as complete failure *by the higher echelons* of command *to detect* and prevent cruel and inhuman treatment accorded by local commanders and guards'; and that, although 'the defence had established the difficulties faced by the Accused' with special reference among other things to the discipline and morale of his troops under the 'swift and overpowering advance of American forces,' and notwithstanding he had stoutly maintained his complete ignorance of the crimes, still he was an officer of long experience; his assignment was one of broad responsibility; it was his duty '*to discover* and control' crimes by his troops, if widespread, and therefore 'The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against the people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.

"'Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging.' (Emphasis added.)"

" At the most ' permitting ' could charge knowledge only by inference or implication. And reasonably the word could be taken in the context of the charge to mean ' allowing ' or ' not preventing,' a meaning consistent with absence of knowledge and mere failure to discover. In capital cases such ambiguity is wholly out of place. The proof was equally ambiguous in the same respect, so far as we have been informed, and so, to repeat, were the findings. The use of ' wilfully,' even qualified by a ' must have,' one time only in the findings hardly can supply the absence of that or an equivalent word or language in the charge or in the proof to support that essential element in the crime. . . ."

The judgment itself then goes on :

" It is in respect to this feature especially, quite apart from the reception of unverified rumour, report, etc., that perhaps the greatest prejudice arose from the admission of untrustworthy, unverified, unauthenticated evidence which could not be probed by cross-examination or other means of testing credibility, probative value or authenticity.

" Counsel for the defence have informed us in the brief and at the argument that the sole proof of knowledge introduced at the trial was in the form of *ex parte* affidavits and depositions. Apart from what has been excepted from the record in the applications and the briefs, and such portions of the record as I have been able to examine, it has been impossible for me fully to verify counsel's statement in this respect. But the Government has not disputed it ; and it has maintained that we have no right to examine the record upon any question ' of evidence.' Accordingly, without concession to that view, the statement of counsel is taken for the fact. And in that state of things, petitioner has been convicted of a crime in which knowledge is an essential element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military, and which furthermore Congress has expressly commanded shall not be received in such cases tried by military commissions and other military tribunals.(1)

" Moreover counsel assert in the brief, and this also is not denied, that the sole proof made of certain of the specifications in the Bills of Particulars was by *ex parte* affidavits. It was in relation to this also vital phase of the proof that there occurred one of the Commission's reversals of its earlier rulings in favour of the defence, a fact in itself conclusive demonstration of the necessity to the Prosecution's case of the prohibited type of evidence and of its prejudicial effects upon the Defence."

A footnote explains the reference to " one of the Commission's reversals of its earlier rulings " : " On 1st November, early in the trial, the President of the Commission stated : ' I think the Prosecution should consider the desirability of striking certain items. The Commission feels that there must be witnesses introduced on each of the specifications or items. *It has no objection to considering affidavits, but it is unwilling to form an opinion*

(1) See p. 63-9 for the material to which the judgment here makes cross-references.

of a particular item based solely on an affidavit. Therefore, until evidence is introduced, these particular exhibits are rejected.' (Emphasis added.)

" Later evidence of the excluded type was offered, to introduction of which the Defence objected on various grounds including the prior ruling. At the Prosecution's urging the Commission withdrew to deliberate. Later it announced that ' after further consideration, the Commission reverses that ruling [of 1st November] and affirms its prerogative of receiving and considering affidavits or depositions, if it chooses to do so, for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony.' It then added : ' The Commission *directs* the Prosecution again to introduce the affidavits or depositions then in question, and other documents of similar nature which the Prosecution stated has been prepared for introduction.' (Emphasis added.)

" Thereafter this type of evidence was consistently received and again, by the undisputed statement of counsel, as the sole proof of many of the specifications of the bills, a procedure which they characterise correctly in my view as having ' in effect, stripped the proceeding of all semblance of a trial and converted it into an *ex parte* investigation.' "

(iv) *Concluding Remarks on the Type of Evidence Admitted*

The Judgment continues :

" These two basic elements in the proof, namely, proof of knowledge of the crimes and proof of the specifications in the bills, that is, of the atrocities themselves, constitute the most important instances perhaps, if not the most flagrant,(1) of departure not only from the express command of Congress against receiving such proof but from the whole British–American tradition of the common law and the Constitution. Many others occurred, which there is neither time nor space to mention.(2)

" Petitioner asserts, and there can be no reason to doubt, that by the use of all this forbidden evidence he was deprived of the right of cross-examination and other means to establish the credibility of the deponents or affiants, not to speak of the authors of reports, letters, documents and newspaper articles ; of opportunity to determine whether the multitudinous crimes specified in the bills were committed in fact by troops under his command or by naval or air force troops not under his command at the time alleged ; to ascertain whether the crimes attested were isolated acts of individual soldiers or were military acts committed by troops units acting under supervision of officers ; and,

(1) " This perhaps consisted in the showing of the so-called ' propaganda ' film, ' Orders from Tokyo,' portraying scenes of battle destruction in Manila, which counsel say ' was not in itself seriously objectionable.' Highly objectionable, inflammatory and prejudicial, however, was the accompanying sound track with comment that the film was ' evidence which will convict,' mentioning petitioner specifically by name."

(2) " Innumerable instances of hearsay, once or several times removed, relating to all manner of incidents, rumours, reports, etc., were among these. Many instances, too, are shown of the use of opinion evidence and conclusions of guilt, including reports made after *ex parte* investigations by the War Crimes Branch of the Judge Advocate General's Department, which it was and is urged had the effect of ' putting the prosecution on the witness stand ' and of usurping the commission's function as judge of the law and the facts. It is said also that some of the reports were received as the sole proof of some of the specifications."

finally, whether ' in short, there was such a " pattern " of conduct as the Prosecution alleged and its whole theory of the crime and the evidence required to be made out.'

" He points out in this connection that the Commission based its decision on a finding as to the extent and number of the atrocities and that this of itself establishes the prejudicial effect of the affidavits, etc., and of the denial resulting from their reception of any means of probing the evidence they contained, including all opportunity for cross-examination. Yet it is said there is no sufficient showing of prejudice. The effect could not have been other than highly prejudicial. The matter is not one merely of ' rules of evidence.' It goes, as will appear more fully later, to the basic right of defence, including some fair opportunity to test probative value.

" Insufficient as this recital is to give a fair impression of what was done, it is enough to show that this was no trial in the traditions of the common law and the Constitution. If the tribunal itself was not strange to them otherwise, it was in its forms and modes of procedure, in the character and substance of the evidence it received, in the denial of all means to the accused and his counsel for testing the evidence, in the brevity and ambiguity of its findings made upon such a mass of material and, as will appear, in the denial of any reasonable opportunity for preparation of the defence. Because this last deprivation not only is important in itself, but is closely related to the departures from all limitations upon the character of and modes of making the proof, it will be considered before turning to the important legal questions relating to whether all these violations of our traditions can be brushed aside as not forbidden by the valid Acts of Congress, treaties and the Constitution, in that order. If all these traditions can be so put away, then indeed will we have entered upon a new but foreboding era of law."

(v) *The Alleged Denial of Opportunity to Prepare Defence*

Mr. Justice Rutledge claimed that Yamashita's six Defence Counsel would have found it impossible to prepare adequately, during the three weeks before the trial, a defence against the 64 items contained in the Bill of Particulars,(1) " had nothing more occurred." He went on :

" But there was more. On the first day of the trial, 29th October, the Prosecution filed a Supplemental Bill of Particulars, containing 59 more specifications of the same general character, involving perhaps as many incidents occurring over an equally wide area. A copy had been given the Defence three days earlier. One item, No. 89, charged that American soldiers, prisoners of war, had been tried and executed without notice having been given to the Protecting Power of the United States in accordance with the requirements of the Geneva Convention, which it is now argued, strangely, the United States was not required to observe as to petitioner's trial."

After recapitulating the various requests of the Defence for a continuance,(2) Mr. Justice Rutledge expressed the following view :

(1) See p. 4.

(2) And also the Commission's rulings of 1st and 5th November, 1945, regarding admissibility of uncorroborated affidavits. See pp. 10, 15-16, 23 and 60-1.

" Further comment is hardly required. Obviously the burden placed upon the Defence, in the short time allowed for preparation on the original bill, was not only ' tremendous.' In view of all the facts, it was an impossible one, even though the time allowed was a week longer than asked. But the grosser vice was later when the burden was more than doubled by service of the supplemental bill on the eve of trial, a procedure which taken in connection with the consistent denials of continuance and the Commission's later reversal of its rulings favourable to the Defence was wholly arbitrary, cutting off the last vestige of adequate chance to prepare defence and imposing a burden the most able counsel could not bear. This sort of thing has no place in our system of justice, civil or military. Without more, this wide departure from the most elementary principles of fairness vitiated the proceeding. When added to the other denials of fundamental right sketched above, it deprived the proceeding of any semblance of trial as we know that institution."

(vi) *The Question of the Applicability of the Articles of War*

On the point, Mr. Justice Rutledge said :

" The Court's opinion puts the proceeding and the petitioner, in so far as any rights relating to his trial and conviction are concerned, wholly outside the Articles of War. In view of what has taken place, I think the decision's necessary effect is also to place them entirely beyond limitation and protection, respectively, by the Constitution. I disagree as to both conclusions or effects.

" The Court rules that Congress has not made Articles 25 and 38 applicable to this proceeding. I think it has made them applicable to this and all other military commissions or tribunals. If so the Commission not only lost all power to punish petitioner by what occurred in the proceedings. It never acquired jurisdiction to try him. For the directive by which it was constituted, in the provisions of Section 16,(1) was squarely in conflict with Articles 25 and 38 of the Articles of War(2) and therefore was void.

(1) A cross-reference is here made to the material now on page 57, note 2.

(2) " Article 25 is as follows : ' A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before *any military court or commission in any case not capital, or* in any proceeding before a *court of inquiry or a military board, if* such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing : *Provided, that testimony by deposition may be adduced for the defence in capital cases.*' (Emphasis added.) 10 U.S.C. s. 1496."

" Article 38 reads : ' The President may, by regulations which he may modify from time to time, prescribe the procedure, *including modes of proof,* in cases before *courts martial, courts of inquiry, military commissions, and other military tribunals,* which regulations shall in so far as he shall deem practicable, apply the rules of evidence generally recognised in the trial of criminal cases in the district courts of the United States : Provided, *That nothing contrary to or inconsistent with these articles shall be so prescribed* : Provided further, *That all rules made in pursuance of this article shall be laid before the Congress annually.*' (Emphasis added.) 10 U.S.C. s. 1509."

" Article 25 allows reading of depositions in evidence, under prescribed conditions, in the plainest terms ' before *any* military court or commission *in any case not capital,*' providing, however, that ' testimony by deposition may be adduced *for the defence in capital cases.*' (Emphasis added.) This language clearly and broadly covers every kind of military tribunal, whether ' court ' or ' commission.' It covers all capital cases. It makes no exception or distinction for any accused.

" Article 38 authorises the President by regulations to prescribe procedure, including modes of proof, even more all-inclusively if possible, ' in cases before courts martial, courts of inquiry, military commissions, and other military tribunals.' Language could not be more broadly inclusive. No exceptions are mentioned or suggested, whether of tribunals or of accused persons. Every kind of military body for performing the function of trial is covered. That is clear from the face of the Article.

" Article 38 moreover limits the President's power. He is so far as practicable to prescribe ' the rules of evidence generally recognised in the trial of criminal cases in the district courts of the United States,' a clear mandate that Congress intended all military trials to conform as closely as possible to our customary procedural and evidentiary protections, constitutional and statutory, for accused persons. But there are also two unqualified limitations, one ' that nothing contrary to or inconsistent with these articles [specifically here Article 25] shall be so prescribed ' ; the other ' that all rules made in pursuance of this article shall be laid before the Congress annually.'

" Notwithstanding these broad terms the Court, resting chiefly on Article 2, concludes the petitioner was not among the persons there declared to be subject to the Articles of War and therefore the Commission which tries him is not subject to them. That Article does not cover prisoners of war or war criminals. Neither does it cover civilians in occupied territories, theatres of military operations or other places under military jurisdiction within or without the United States or territory subject to its sovereignty, whether they be neutrals or enemy aliens, even citizens of the United States, unless they are connected in the manner Article 2 prescribes with our armed forces, exclusive of the Navy.

" The logic which excludes petitioner on the basis that prisoners of war are not mentioned in Article 2 would exclude all these. I strongly doubt the Court would go so far, if presented with a trial like this in such instances. Nor does it follow necessarily that, because some persons may not be mentioned in Article 2, they can be tried without regard to any of the limitations placed by any of the other Articles upon military tribunals.

" Article 2 in defining persons ' subject to the Articles of War ' was, I think, specifying those to whom the Articles in general were applicable. And there is no dispute that most of the Articles are not applicable to the petitioner. It does not follow, however, and Article 2 does not provide, that there may not be in the Articles specific provisions covering persons other than those specified in Article 2. Had it so provided,

Article 2 would have been contradictory not only of Articles 25 and 38 but also of Article 15 among others.

" In 1916, when the last general revision of the Articles of War took place,(1) for the first time certain of the Articles were specifically made applicable to military commissions. Until then they had applied only to courts martial. There were two purposes, the first to give statutory recognition to the military commission without loss of prior jurisdiction and the second to give those tried before military commissions some of the more important protections afforded persons tried by courts martial.

" In order to effectuate the first purpose, the Army proposed Article 15.(2). To effectuate the second purpose, Articles 25 and 38 and several

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(1) " Another revision of the Articles of War took place in 1920. At this time Article 15 was slightly amended.

In 1916 Article 15 was enacted to read: 'The provisions of these Articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals *of concurrent jurisdiction* in respect of offenders or offences that by the Law of War may be lawfully triable by such military commissions, provost courts, or other military tribunals.' (Emphasis added.)

The 1920 amendment put in the words ' by statute or ' before the words ' by the Law of War ' and omitted the word ' lawfully'."

(2) " Speaking at the Hearings before the Committee on Military Affairs, House of Representatives, 62nd Cong., 2nd Sess., printed as an Appendix to S. Rep. 229, 63rd Cong., 2nd Sess., General Crowder said:

' The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of General Scott, viz., the military commission and the council of war. By the military commission General Scott tried cases cognisable in time of peace by civil courts, and by the council of war he tried offences against the Laws of War. *The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission,* which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorised by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code *the jurisdiction of courts martial has been somewhat amplified by the introduction of the phrase " Persons subject to military law." There will be more instances in the future than in the past when the jurisdiction of courts martial will overlap that of the war courts,* and the question would arise whether Congress having vested jurisdiction by statute the common law or war *jurisdiction* was not ousted. I wish to make it *perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.*' S. Rep. No. 229, 63rd Cong., 2nd Sess., p. 53. (Emphasis added.)

" And later, in 1916, speaking before the Sub-committee on Military Affairs of the Senate at their Hearings on S. 3191, a project for the revision of the Articles of War, 64th Cong., 1st Sess., printed as an Appendix to the S. Rep. 230, 64th Cong., 1st Sess., General Crowder explained at greater length:

' Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commissions. A military commission is our common-law war court. It has no statutory existence, though it is recognised by statute law. As long as the articles embraced them in the designation " persons subject to military law," and provided that they might be tried by court martial, *I was afraid that, having made a special provision for their court martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced. . . .*'

" *It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts martial, so that the military commander in the field* in time of war *will be at liberty to employ either form of court* that happens to be convenient. *Both classes of courts have the same procedure.* For the information of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's Military Law and Precedents:

' The military commission—a war court—had its origin in G.O. 20, Headquarters of the Army at Tampico, 19th February, 1847 (General Scott). Its jurisdiction was confined mainly to criminal offences of the class cognisable by civil courts in time of

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others were proposed.(1) But as the Court now construes the Articles of War, they have no application to military commissions before which alleged offenders against the Laws of War are tried. What the Court holds in effect is that there are two types of military commission, one to try offences which might be cognisable by a court martial, the other to try war crimes, and that Congress intended the Articles of War referring in terms to military commissions without exception to be applicable only to the first type.

" This misconceives both the history of military Commissions and the legislative history of the Articles of War. There is only one kind of military Commission. It is true, as the history noted shows, that what is now called ' the military commission ' arose from two separate military courts instituted during the Mexican War. The first military court, called by General Scott a ' military commission,' was given jurisdiction in Mexico over criminal offences of the class cognisable by civil courts in time of peace. The other military court, called a ' council of war ' was given jurisdiction over offences against the Laws of War. Winthrop, *Military Law and Precedents* (2nd Edition, reprinted 1920) *1298-1299. During the Civil War ' the two jurisdictions of the earlier commission and council respectively . . . [were] *united* in the . . . war court, for which the general designation of ' military commission ' was retained as the preferable one." Winthrop, *supra*, at *1299. Since that time there has been only one type of military tribunal called the military commission, though it may exercise different kinds of

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peace committed by inhabitants of the theatre of hostilities. A further war court was originated by General Scott at the same time, called " council of war," with jurisdiction to try the same classes of persons for violations of the Laws of War mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of " military commission " was retained. The military commission was given statutory recognition in section 30, act of 3rd March, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (*Ex parte* Vallandigham, 1 Wall. 243 and *Coleman* v. *Tennessee*, 97 U.S. 509). It tried more than 2,000 cases during the Civil War and reconstruction period. *Its composition, constitution, and procedure follows the analogy of courts martial.* Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts ; and other war courts variously designated " courts of conciliation," " arbitrators," " military tribunals " have been convened by military commanders in the exercise of the war power as occasion and necessity dictated.'

' Yet, as I have said, these war courts never have been formally authorised by statute.

' Senator Colt : They grew out of usage and necessity ?

' General Crowder : Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record.' S. Rep. No. 130, 64th Cong., 1st Sess. (1916) p. 40. (Emphasis added.)

" Article 15 was also explained in the ' Report of a committee on the proposed revision of the Articles of War, pursuant to instructions of the Chief of Staff, 10th March, 1915,' included in Revision of the Articles of War, Comparative Prints, etc., 1904-1920, J.A.G.O., as follows :

' A number of articles . . . of the revision have the effect of giving courts martial jurisdiction over certain offenders and offences which, under the Law of War or by statute, are also triable by military commissions, provost courts, etc. Article 15 is introduced for the purpose of making clear that in such cases a court martial has only a concurrent jurisdiction with such war tribunals.'"

(1) " Of course Articles 25 and 38, at the same time that they gave protection to defendants before military commissions, also provided for the application by such tribunals of modern rules of procedure and evidence."

jurisdiction,[1] according to the circumstances under which and purposes for which it is convened.

" The testimony of General Crowder is perhaps the most authoritative evidence of what was intended by the legislation, for he was its most active official sponsor, spending years in securing its adoption and revision. Articles 15, 25 and 38 particularly are traceable to his efforts. His concern to secure statutory recognition for military commissions was equalled by his concern that the statutory provisions giving this should not restrict their pre-existing jurisdiction. He did not wish by securing additional jurisdiction, overlapping partially that of the court martial, to surrender other. Hence Article 15. That Article had one purpose and one only. It was to make sure that the acquisition of partially concurrent jurisdiction with courts martial should not cause loss of any other. And it was jurisdiction, not procedure, which was covered by other Articles, with which he and Congress were concerned in that Article. It discloses no purpose to deal in any way with procedure or to qualify Articles 25 and 38. And it is clear that General Crowder at all times regarded all military commissions as being governed by the identical procedure. In fact, so far as Articles 25 and 38 are concerned, this seems obvious for all types of military tribunals. The same would appear to be true of other Articles also, e.g., 24 (prohibiting compulsory self-incrimination), 26, 27 and 32 (contempts), all except the last dealing with procedural matters.

" Article 12 is especially significant. It empowers general courts martial to try two classes of offenders : (1) ' any person *subject to military law*,' under the definition of Article 2, for any offences ' made punishable by these articles ' ; (2) ' and any other person who *by the Law of War* is subject to trial *by military tribunals*,' not covered by the terms of Article 2. (Emphasis added).

" Article 12 thus, in conformity with Article 15, gives the general court martial concurrent jurisdiction of war crimes and war criminals with military commissions. Neither it nor any other Article states or indicates there are to be *two* kinds of general courts martial for trying war crimes ; yet this is the necessary result of the Court's decision, unless in the alternative that would be to imply that in exercising such jurisdiction there is only one kind of general court martial, but there are two or more kinds of military commission, with wholly different procedures and with the result that ' the commander in the field ' will not be free to determine whether general court martial or military commission shall be used as the circumstances may dictate, but must govern his choice by the kind of procedure he wishes to have employed.

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[1] " Winthrop, speaking of military commissions at the time he was writing, 1896, says : ' The offences cognisable by military commissions may thus be classed as follows : (1) Crimes and statutory offences cognisable by State or U.S. courts, and which would properly be tried by such courts if open and acting ; (2) *Violations of the laws and usages of war* cognisable by military tribunals only ; (3) Breaches of military orders or regulations for which offenders are not legally triable by court martial under the Articles of War.' Emphasis added.) Winthrop, at *1309. And cf. Fairman, *The Law of Martial Rule* (2nd Edition 1943) : ' Military commission taken cognisance of three categories of criminal cases : *offences against the Laws of War*, breaches of military regulations, and civil crimes which, where the ordinary courts have ceased to function, cannot be tried normally.' (Emphasis added.) Fairman, 265-266. See also Davis, *A Treatise on the Military Law of the United States* (1915) 309-310."

" The only reasonable and, I think, possible conclusion to draw from the Articles is that the Articles which are in terms applicable to military commissions are so uniformly and those applicable to both such commissions and to courts martial when exercising jurisdiction over offenders against the Laws of War likewise are uniformly applicable, and not diversely according to the person or offence being tried.

" Not only the face of the Articles, but specific statements in General Crowder's testimony support this view. Thus in the portion quoted above(1) from his 1916 statement, after stating expressly the purpose of Article 15 to preserve unimpaired the military commission's jurisdiction, and to make it concurrent with that of courts martial in so far as the two would overlap, ' so that the *military commander in the field* in time of war will be at liberty to employ either form of court that happens to be convenient,' he went on to say : ' Both classes of courts have the same procedure,' a statement so unequivocal as to leave no room for question. And his quotation from Winthrop supports his statement, namely : ' Its [i.e., the military commission's] composition, constitution and procedure follow the analogy of courts martial.'

" At no point in the testimony is there suggestion that there are two types of military commission, one bound by the procedural provisions of the Articles, the other wholly free from their restraints or, as the Court strangely puts the matter, that there is only one kind of commission, but that it is bound or not bound by the Articles applicable in terms, depending upon who is being tried and for what offence ; for that very difference makes the difference between one and two. The history and the discussion show conclusively that General Crowder wished to secure and Congress intended to give statutory recognition to all forms of military tribunals ; to enable commanding officers in the field to use either court martial or military commission as convenience might dictate, thus broadening to this extent the latter's jurisdiction and utility at the same time to preserve its full pre-existing jurisdiction ; and also to lay down identical provisions for governing or providing for the government of the procedure and rules of evidence of every type of military tribunal, wherever and however constituted.(2)

(1) A cross-reference is here made to the material contained in footnote (2) to p. 65.

(2) " In addition to the statements of General Crowder with relation to Article 15, set out in note (2) to p. 65, see the following statements made with reference to Article 25, in 1912 at a hearing before the Committee on Military Affairs of the House : ' We come now to Article 25, which relates to the admissibility of depositions. . . . It will be noted further that *the application of the old article has been broadened to include military commissions, courts of inquiry, and military boards.*'

' Mr. Sweet. Please explain what you mean by military commission.

' General Crowder. That is our common Law of War court, and was referred to by me in a prior hearing. [The reference is to the discussion of Article 15.] This war court came into existence during the Mexican War, and was created by orders of General Scott. It had jurisdiction to try all cases usually cognisable in time of peace by civil courts. General Scott created another war court, called the ' council of war,' with jurisdiction to try offences against the Laws of War. The constitution, composition, and jurisdiction of these courts *have never been regulated by statute.* The council of war did not survive the Mexican War period, since which its jurisdiction has been taken over by the military commission. The military commission received express recognition in the reconstruction acts, and its *jurisdiction* has been affirmed and supported by all our courts. It was extensively employed during the Civil War period and also during the Spanish-American War. It is highly desirable that this important war court should be continued to be

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" Finally, unless Congress was legislating with regard to all military commissions, Article 38, which gives the President the power to ' prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals ' takes on a rather senseless meaning ; for the President would have such power only with respect to those military commissions exercising concurrent jurisdiction with courts martial.

" All this seems so obvious, upon a mere reading of the Articles themselves and the legislative history, as not to require demonstration. And all this Congress knew, as that history shows. In the face of that showing I cannot accept the Court's highly strained construction, first, because I think it is in plain contradiction of the facts disclosed by the history of Articles 15, 25 and 38 as well as their language ; and also because that construction defeats at least two of the ends General Crowder had in mind, namely, to secure statutory recognition for every form of military tribunal and to provide for them a basic uniform mode of procedure or method of providing for their procedure.

" Accordingly, I think Articles 25 and 38 are applicable to this proceeding ; that the provisions of the governing directive in section 16 are in direct conflict with those Articles ; and for that reason the commission was invalidly constituted, was without jurisdiction, and its sentence is therefore void."

(vii) *The Question of the Applicability of the Geneva Convention of* 1929

On the question, the opinion of Mr. Justice Rutledge was as follows :

" If the provisions of Articles 25 and 38 were not applicable to the proceeding by their own force as Acts of Congress, I think they would still be made applicable by virtue of the terms of the Geneva Convention of 1929, in particular Article 63. And in other respects, in my opinion the petitioner's trial was not in accord with that treaty, namely, with Article 60.

" The Court does not hold that the Geneva Convention is not binding upon the United States and no such contention has been made in

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governed as heretofore, by the Laws of War rather than by statute.' S. Rep. No. 229, 63rd Cong., 2nd Sess., 59 ; cf. S. Rep. 130, 64th Cong., 1st Sess., 54-55. (Emphasis added.) See also Hearings before the Sub-committee of the Committee on Military Affairs of the Senate on Establishment of Military Justice, 66th Cong., 1st Sess., 1182-1183.

" Further evidence that procedural provisions of the Articles were intended to apply to all forms of military tribunal is given by Article 24, 10 U.S.C. s. 1495, which provides against compulsory self-incrimination ' before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation.' This article was drafted so that ' The prohibition should reach all witnesses, *irrespective* of the class of military tribunal before which they appear. . . .' (Emphasis added.) Comparative Print showing s. 3191 with the Present Articles of War and other Related Statutes, and Explanatory Notes, printed for use of the Senate Committee on Military Affairs, 64th Cong., 1st Sess., 17, included in Revision of the Articles of War, Comparative Prints, etc., 1904-1920, J.A.G.O."

this case.[1] It relies on other arguments to show that Article 60, which provides that the protecting power shall be notified in advance of a judicial proceeding directed against a prisoner of war, and Article 63, which provides that a prisoner of war may be tried only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power, are not properly invoked by the petitioner. Before considering the Court's view that these Articles are not applicable to this proceeding by their terms, it may be noted that on his surrender petitioner was interned in conformity with Article 9 of this Convention.

" The chief argument is that Articles 60 and 63 have reference only to offences committed by a prisoner of war while a prisoner of war and not to violations of the Law of War committed while a combatant. This conclusion is derived from the setting in which these articles are placed. I do not agree that the context gives any support to this argument. The argument is in essence of the same type as the argument the Court employs to nullify the application of Articles 25 and 38 of the Articles of War by restricting their own broader coverage by reference to Article 2. For reasons set forth in the margin,[2] I think it equally invalid here.

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[1] " We are informed that Japan has not ratified the Geneva Convention. See discussion of Article 82 in the paragraphs below. We are also informed, however—and all the record shows this at least as to Japan—that at the beginning of the war both the United States and Japan announced their intention to adhere to the provisions of that treaty. The force of that understanding continues, perhaps with greater reason if not effect, despite the end of hostilities. See note 40 and text. [Now on p. 73].

Article 82 provides :

' The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances.

' In case, in time of war, one of the belligerents is not a party to the Convention, its provisions shall nevertheless remain in force as between the belligerents who are parties thereto.'

" It is not clear whether the Article means that during a war, when one of the belligerents is not a party to the Convention, the provisions must nevertheless be applied by all the other belligerents to the prisoners of war not only of one another but also of the power that was not a party thereto or whether it means that they need not be applied to soldiers of the non-participating party who have been captured. If the latter meaning is accepted, the first paragraph would seem to contradict the second.

" ' Legislative history ' here is of some, if little, aid. A suggested draft of a convention on war prisoners drawn up in advance of the Geneva meeting by the International Committee of the Red Cross (Actes de la Conférence Diplomatique de Genève, edited by Des Gouttes, pp. 21-34) provided in Article 92 that the provisions of the Convention ' ne cesseront d'être obligatoires qu'au cas où l'un des Etats belligérents participant à la Convention se trouve avoir à combattre les forces armées d'un autre Etat que n'y serait par partie et à l'égard de cet Etat seulement.' See Rasmussen, Code des Prisonniers de Guerre (1931) 70. The fact that this suggested article was not included in the Geneva Convention would indicate that the nations in attendance were avoiding a decision on this problem. But I think it shows more, that is, it manifests an intention not to foreclose a future holding that under the terms of the Convention a state is bound to apply the provisions to prisoners of war of non-participating state. And not to foreclose such a holding is to invite one. We should, in my opinion, so hold, for reasons of security to members of our own armed forces taken prisoner, if for no others.

" Moreover, if this view is wrong and the Geneva Convention is not strictly binding upon the United States as a treaty, it is strong evidence of and should be held binding as representing what have become the civilised rules of international warfare. Yamashita is as much entitled to the benefit of such rules as to the benefit of a binding treaty which codifies them. See U.S. War Department, Basic Field Manual, Rules of Land Warfare (1940), para. 5(*b*)."

[2] " Title III of the Convention, which comprises Articles 7 to 67, is called ' Captivity.' It contains Section I, ' Evacuation of Prisoners of War ' (Articles 7-8) ; Section II,

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" Neither Article 60 nor Article 63 contains such a restriction of meaning as the Court reads into them.(1) In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before capture or later. Policy supports this view. For such a construction is required for the security of our own soldiers, taken prisoner, as much as for that of prisoners we take. And the opposite one leaves prisoners of war open to any form of trial and punishment for offences against

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' Prisoners-of-War Camps ' (Articles 9-26) ; Section III, ' Labour of Prisoners of War ' (Articles 27-34) ; Section IV, ' External Relations of Prisoners of War ' (Articles 35-41) ; and Section V, ' Prisoners' Relations with the Authorities ' (Articles 42-67). Thus Title III regulates all the various incidents of a prisoner of war's life while in captivity.

" Section V, with which we are immediately concerned, is divided into three chapters. Chapter 1 (Article 42) gives a prisoner of war the right to complain of his condition of captivity. Chapter 2 (Articles 43-44) gives prisoners of war the right to appoint agents to represent them. Chapter 3 is divided into three subsections and is termed ' Penalties Applicable to Prisoners of War.' Subsection 1 (Articles 45-53) contains various miscellaneous articles to be considered in detail later. Subsection 2 (Articles 54-59) contains provisions with respect to disciplinary punishments. And subsection 3 (Articles 60-67) which is termed ' Judicial Suits ' contains various provisions for protection of a prisoner's rights in judicial proceedings instituted against him.

" Thus, subsection 3, which contains Articles 60 and 63, as opposed to subsection 2, of Chapter 3, is concerned not with mere problems of discipline, as is the latter, but with the more serious matters of trial leading to imprisonment or possible sentence of death ; cf. Brereton, The Administration of Justice Among Prisoners of War by Military Courts (1935) I Proc. Australian and New Zealand Society of International Law 143, 153. The Court, however, would have the distinction between subsection 2 and subsection 3 one between minor disciplinary action against a prisoner of war for acts committed while a prisoner and major judicial action against a prisoner of war for acts committed while a prisoner. This narrow view not only is highly strained, confusing the different situations and problems treated by the two subsections. It defeats the most important protections subsection 3 was intended to secure for our own as well as for enemy captive military personnel.

" At the most there would be logic in the Court's construction if it could be said that all of Chapter 3 deals with acts committed while a prisoner of war. Of course, subsection 2 does, because of the very nature of its subject matter. Disciplinary action will be taken by a captor power against prisoners of war only for acts committed by prisoners after capture.

" But it is said that subsection 1 deals exclusively with acts committed by a prisoner of war after having become a prisoner, and this indicates subsection 3 is limited similarly. This ignores the fact that some of the articles in subsection 1 appear, on their face, to apply to all judicial proceedings for whatever purpose instituted. Article 46, for example provides in part:

> ' Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining Power.'

" This, seems to refer to war crimes as well as to other offences ; for surely a country cannot punish soldiers of another army for offences against the Law of War, when it would not punish its own soldiers for the same offences. Similarly, Article 47 in subsection 1 appear to refer to war crimes as well as to crimes committed by a prisoner after his capture. It reads in part:

> ' Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit ; preventive imprisonment shall be limited as much as possible.'

" Thus, at the most, subsection 1 contains, in some of its articles, the same ambiguities and is open to the same problem that we are faced with in construing Articles 60 and 63. It cannot be said, therefore, that all of chapter 3 and especially subsection 3 relate only to acts committed by prisoners of war after capture, for the meaning of subsection 3, in this argument, is related to the meaning of subsection 1 ; and subsection 1 is no more clearly restricted to punishments and proceedings in disciplinary matters than is subsection 3."

(1) " Article 60 pertinently is as follows : ' At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial.

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the Law of War their captors may wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offence. This, in many instances, would be to make the treaty strain at a gnat and swallow the camel.

" The United States has complied with neither of these Articles. It did not notify the Protecting Power of Japan in advance of trial as Article 60 requires it to do, although the supplemental bill charges the same failure to petitioner in Item 89.(1) It is said that, although this may be true, the proceeding is not thereby invalidated. The argument is that our non-compliance merely gives Japan a right of indemnity against us and that Article 60 was not intended to give Yamashita any personal rights. I cannot agree. The treaties made by the United States are by the Constitution made the supreme law of the land. In the absence of something in the treaty indicating that its provisions were not intended to be enforced, upon breach, by more than subsequent indemnification, it is, as I conceive it, the duty of the courts of this country to insure the nation's compliance with such treaties, except in the case of political questions. This is especially true where the treaty has provisions—such as Article 60—for the protection of a man being tried for an offence the punishment for which is death ; for to say that it was intended to provide for enforcement of such provisions solely by claim, after breach, of indemnity would be in many instances, especially those involving trial of nationals of a defeated nation by a conquering one, to deprive the Articles of all force. Executed men are not much aided by post-war claims for indemnity. I do not think the adhering Powers' purpose was to provide only such ineffective relief.

" Finally, the Government has argued that Article 60 has no application after the actual cessation of hostilities, as there is no longer any need for an intervening Power between the two belligerents. The premise is that Japan no longer needs Switzerland to intervene with the United States to protect the rights of Japanese nationals, since Japan is now in direct communication with this Government. This of course is in contradiction of the Government's theory, in other connections, that the war is not over and military necessity still requires use of all the power necessary for actual combat.

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This advice shall contain the following information :

' (*a*) Civil state and rank or prisoner ;

' (*b*) Place of sojourn or imprisonment ;

' (*c*) Specification of the [count] or counts of the indictment, giving the legal provisions applicable.'

" ' If it is not possible to mention in that advice the court which will pass upon the matter, the date of opening the trial and the place where it will take place, this information must be furnished to the representative of the protecting Power later, as soon as possible, and at all events, at least three weeks before the opening of the trial.' "

" Article 63 reads : ' Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.' "

(1) " Item 89 charged the armed forces of Japan with subjecting to trial certain named and other prisoners of war ' without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel ; denying opportunity to appeal from the sentence rendered ; failing to notify the protecting power of the sentence pronounced ; and executed a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offence charged.' "

" Furthermore, the premise overlooks all the realities of the situation. Japan is a defeated power, having surrendered, if not unconditionally, then under the most severe conditions. Her territory is occupied by American military forces. She is scarcely in a position to bargain with us or to assert her rights. Nor can her nationals. She no longer holds American prisoners of war.(1) Certainly, if there was the need of an independent neutral to protect her nationals during the war, there is more now. In my opinion the failure to give the notice required by Article 60 is only another instance of the Commission's failure to observe the obligations of our law.

" What is more important, there was no compliance with Article 63 of the same Convention. Yamashita was not tried ' according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.' Had one of our soldiers or officers been tried for alleged war crimes, he would have been entitled to the benefits of the Articles of War. I think that Yamashita was equally entitled to the same protection. In any event, he was entitled to their benefits under the provisions of Article 63 of the Geneva Convention. Those benefits he did not receive. Accordingly, his trial was in violation of the Convention."

(viii) *The Question of the Applicability of the Fifth Amendment to the United States Constitution*(2)

Mr. Justice Rutledge's view on this final topic was expressed in his judgment as follows :

" Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

" The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause.

" For it is exactly here we enter wholly untroddden ground. The safe signposts to the rear are not in the sum of protections surrounding jury trials or any other proceeding known to our law. Nor is the essence of the Fifth Amendment's elementary protection comprehended in any single one of our time-honoured specific constitutional safeguards in trial, though there are some without which the words ' fair trial ' and all they connote become a mockery.

(1) " Nations adhere to international treaties regulating the conduct of war at least in part because of the fear of retaliation. Japan no longer has the means of retaliating."

(2) See p. 49.

" Apart from a tribunal concerned that the law as applied shall be an instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumour, report, or the results of the prosecution's *ex parte* investigations, but shall stand on proven fact ; the other, correlative, lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offence with which one is to be charged ; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so, as also in the trial itself ; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence then to have further reasonable time for meeting the unexpected shift.

" So far as I know, it has not yet been held that any tribunal in our system, of whatever character, is free to receive ' such evidence as *in its opinion* ' would be ' *of assistance* in proving or disproving the charge ' or, again as in its opinion, ' would have probative value in the mind of a reasonable man ' ; and, having received what in its unlimited discretion it regards as sufficient, is also free to determine what weight may be given to the evidence received without restraint.(1)

" When to this fatal defect in the directive, however innocently made, are added the broad departures from the fundamentals of fair play in the proof and in the right to defend which occurred throughout the proceeding, there can be no accommodation with the due process of law which the Fifth Amendment demands.

" All this the Court puts to one side with the short assertion that no question of due process under the Fifth Amendment or jurisdiction reviewable here is presented. I do not think this meets the issue, standing alone or in conjunction with the suggestion which follows that the Court gives no intimation one way or the other concerning what Fifth Amendment due process might require in other situations.

" It may be appropriate to add here that, although without doubt the directive was drawn in good faith in the belief that it would expedite the trial and that enemy belligerents in petitioner's position were not entitled to more, that state of mind and purpose cannot cure the nullification of basic constitutional standards which has taken place."

(ix) *Concluding Remarks*

Mr. Justice Rutledge's dissenting judgment ends with these words :

" It is not necessary to recapitulate. The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these

(1) " There can be no limit either to the admissibility or the use of evidence if the only test to be applied concerns probative value and the only test of probative value, as the directive commanded and the commission followed out, lies ' in the Commission's opinion,' whether that be concerning the assistance the ' evidence ' tendered would give in proving or disproving the charge or as it might think would ' have value in the mind of a reasonable man.' Nor is it enough to establish the semblance of a constitutional right that the commission declares, in receiving the evidence, that it comes in as having only such probative value, if any, as the commission decides to award it and this is accepted as conclusive."

proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

" I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

" It was a great patriot who said :

> ' He that would make his own liberty secure must guard even his enemy from oppression ; for if he violates this duty he establishes a precedent that will reach himself.'(1)

" Mr. Justice Murphy joins in this opinion."

16. EXECUTION OF SENTENCE

Yamashita was executed on 23rd February, 1946.

B. NOTES ON THE CASE

It is not proposed in these pages to touch upon all of the many points of legal interest which arose between the commencement of proceedings against Yamashita in Manila and the delivery of judgments by Chief Justice Stone, Mr. Justice Rutledge and Mr. Justice Murphy in the Supreme Court. Attention is to be turned more particularly to the questions of International Law which were involved and, where desirable to a comparative study of international practice on these matters. Among the topics which will not be discussed in this commentary, most of which received extensive treatment during the proceedings and particularly in the judgments delivered by Chief Justice Stone, Mr. Justice Murphy and Mr. Justice Rutledge, are the question of the legal basis in United States Law and the jurisdiction of the Commission which tried Yamashita,(2) the applicability of the United States Articles of War(3) and of the Fifth Amendment to the United States Constitution(4) and the extent to which the Supreme Court of the United States was legally empowered to review the proceedings and findings of United States Military Commissions.(5) It is proposed to devote attention to the following topics ; the legality of the trial of war criminals after the termination of hostilities, the finding that an alleged war criminal is not entitled to the protection of the Geneva Prisoner of War Convention relating to trial, the types of evidence admitted in war crime trial proceedings, the stress placed by the Commission on the need for expeditious procedure, and the responsibility of a commander for offences committed by his troops.

(1) " Tom Paine, quoted in Brooks, The World of Washington Irving, 73, n. I am indebted to Counsel for petitioner for this quotation."

(2) See pp. 38-41, and see Volume I of this series pp. 23-4, 29-31 and 72-9.

(3) See pp. 44 and 63. (4) See pp. 49 and 73. (5) See pp. 39 and 50.

1. THE LEGALITY OF THE TRIAL OF WAR CRIMINALS AFTER THE TERMINATION OF HOSTILITIES

Chief Justice Stone, in delivering the majority judgment of the Supreme Court, stated that :

> " No writer on International Law appears to have regarded the power of military tribunals, otherwise competent to try violations of the Law of War, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commissions after the cessation of hostilities and before the proclamation of peace, for offences against the Law of War committed before the cessation of hostilities."(1)

The dissenting judges made little objection to this point, although Mr. Justice Rutledge thought that there was less necessity for a military commission to be appointed after active hostilities were over, since " there is no longer the danger which always exists before surrender and armistice. . . . The nation may be more secure now than at any time after peace is officially concluded."(2)

It has been pointed out that, " In so far as the application of the usages of war to war crimes is concerned, the jurisdiction of the enemy courts only exists as long as the war lasts. After the war, war crimes can only be prosecuted if they constitute ordinary crimes," and " The most serious shortcoming of customary International Law consists in its limitation for the duration of war of national jurisdiction in war crimes which are not simultaneously ordinary crimes."(3)

The position under customary International Law seems, therefore, to be that whereas (as was recognised by the Supreme Court and by general international practice following the recent war) jurisdiction over war crimes exists without limitation beyond the cessation of fighting and up to the conclusion of peace, jurisdiction continues after this point only over such offences as are also infringements of the municipal law of the state whose courts are trying the alleged offender. Whether an offence fulfils this test of illegality under municipal law will depend upon the laws of each state, and the attitude which these laws reflect to the principle of the territoriality of criminal law.(4)

This position under customary International Law can, of course, be altered by international agreement ; ". . . the belligerents have to make up their mind at the peace conference whether they wish to bury the past by a general amnesty, leave the matter unsettled or institute proceedings in time of peace, a procedure which, as a derogation of customary International Law, requires the sanction of an international agreement between the States concerned."(5) It has thus been possible for the Peace Treaty between the Allied and Associated Powers and Italy to provide, in Article 45, that :

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(1) See p. 42.
(2) See p. 56.
(3) Dr. G. Schwarzenberger, *International Law and Totalitarian Lawlessness*, London, 1943, pp. 61 and 67.
(4) See G. Schwarzenberger, *op cit*, pp. 61-2.
(5) G. Schwarzenberger, *op cit*, p. 67.

"1. Italy shall take all necessary steps to ensure the apprehension and surrender for trial of:

(*a*) Persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity;

(*b*) Nationals of any Allied or Associated Power accused of having violated their national law by treason or collaboration with the enemy during the war.

"2. At the request of the United Nations Government concerned, Italy shall likewise make available as witnesses persons within its jurisdiction, whose evidence is required for the trial of the persons referred to in paragraph 1 of this Article.

"3. Any disagreement concerning the application of the provisions of paragraphs 1 and 2 of this Article shall be referred by any of the Governments concerned to the Ambassadors in Rome of the Soviet Union, of the United Kingdom, of the United States of America, and of France, who will reach agreement with regard to the difficulty."(1)

The Treaties of Peace with Roumania, Bulgaria, Hungary and Finland contain similar provisions.(2) An interesting passage in the official Commentary by the United Kingdom Foreign Office on the Treaty with Italy runs as follows:

"The United Nations have concluded certain agreements between themselves for the bringing to justice of war criminals. Italy, once the Peace Treaty comes into force, would be under no obligation to assist in this matter. Provision is thus made in Article 45 that she should assist in the apprehension and surrender both of war criminals and of quislings."(3)

On the related question of the permissibility under International Law of continuing, after the conclusion of peace, the operation of sentences passed on war criminals before that event, another learned authority has expressed the following view, which commands general assent:

"All war crimes may be punished with death, but belligerents may, of course, inflict a more lenient punishment, or commute a sentence of death into a more lenient penalty. If this be done and imprisonment take the place of capital punishment, the question arises whether persons so imprisoned must be released at the end of the war, although their term of imprisonment has not yet expired. Some answer this question in the affirmative, maintaining that it could never be lawful to inflict a penalty extending beyond the duration of the war. But it is believed that the question has to be answered in the negative. If a belligerent has a right to pronounce a sentence of capital punishment, it is obvious that he may select a more lenient penalty and carry it out even beyond the duration of the war. It would in no wise be in the interest of humanity to deny this right, for otherwise belligerents would be tempted always to pronounce and carry out a sentence of capital punishment in the interest of self-preservation."(4)

(1) British Command Paper, Cmd. 7022, p. 18.

(2) *Ibid*, pp. 80, 100, 119 and 140.

(3) British Command Paper, Cmd. 7026.

(4) Oppenheim—Lauterpacht, *International Law*, Sixth Edition (Revised) Volume II, p. 456.

2. ALLEGED WAR CRIMINALS NOT ENTITLED TO RIGHTS RELATING TO JUDICIAL PROCEEDINGS SET OUT IN THE GENEVA CONVENTION

There was a division of opinion in the Supreme Court as to the applicability of Part 3 (Judicial Proceedings) of Part III, Section V, Chapter 3 of the Geneva Prisoners of War Convention of 1929 to the trial of a person accused of a war crime as distinct from an offence committed while a prisoner.(1) The view taken by the majority, that the Convention does not apply, has, however, been that followed in the practice of the various states which have held war crime trials in recent years.

This principle is so well established that it has rarely been questioned in war crime trials. It was, however, raised, and decided in the same way as in the Yamashita Trial, in the *Dostler Trial* (see Volume I of this series, pp. 29–31) and in the Trial of Martin Gottfried Weiss and 39 others by a General Military Government Court at Dachau, 15th November—13th December, 1945 (*The Dachau Trial*) to be reported in a later volume of these reports. For an interesting decision on the part of the French *Cour de Cassation* (Court of Appeal), that an alleged war criminal is not entitled to the rights provided for a prisoner of war *under French Law* reference should be made to the report on the *Wagner Trial* (see Volume III of these Reports, pp. 42–43). The Court ruled that the appellants were not sent as prisoners of war before the Military Tribunal which tried them and regarded as irrelevant the fact that that Tribunal was not composed in the way laid down for the trial of French military personnel and so, in accordance with paragraph 13 of Article 10 of the *Code de Justice Militaire*, also for the trial of prisoners of war. Paragraph 13 provides that " military tribunals convened to try prisoners of war are composed in the same way as those convened for the trial of French military personnel, that is to say according to the rank of the accused." It will be seen that this is an application in terms of French law of Article 63 of the Geneva Convention : " A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power." In deciding as it did, therefore, the *Cour de Cassation* tacitly affirmed the principle that the provisions of the Geneva Convention regarding judicial proceedings do not protect any prisoner of war during his trial for alleged war crimes.

In an editorial comment on the Yamashita proceedings, Professor Quincy Wright has made a brief but interesting comment on a separate though related aspect of the matter. He states that, irrespective of the interpretation of Article 63 of the Geneva Convention, " it is to be noted that denial of justice in International Law has frequently been interpreted to require, as a minimum, treatment of aliens equal to that of nationals. It may be questioned, however, whether International Law requires the application of this principle in military commissions. The enemy can, apart from specific convention, claim only the international standard even if the national is given more."(2)

3. THE TYPES OF EVIDENCE ADMITTED IN WAR CRIME TRIAL PROCEEDINGS

In commenting upon the conflict of opinion in the Supreme Court as to the admissibility in war crime proceedings of depositions, affidavits, and hearsay

(1) See pp. 46 and 69.
(2) *American Journal of International Law*, Vol. 40, No. 2, April, 1946, p. 405.

and opinion evidence,(1) Professor Quincy Wright points out that, while the majority opinion of the Supreme Court did not cite international practice on this matter, it is clear " that international tribunals have hesitated to exclude any sort of evidence and the courts in many civilised countries are similarly free in the admission of evidence leaving it to the judges to appreciate the weight that should be attached to the materials. Such evidence has been commonly admitted in military tribunals although in American courts martial certain limitations are imposed by statute. It is not believed that admission of such evidence constitutes a denial of justice in International Law."(2)

A study of the rules and the practice followed in war crime trials by other than United States Military Tribunals,(3) does indeed indicate that the tendency to render admissible a wide range of evidence, and to allow the courts then to decide what weight to place on each item is at least in the Anglo-Saxon Countries a general one and is demonstrated not merely in the elastic rules of evidence which are binding on the courts but also by the liberal interpretations placed by the courts on these provisions when points of doubt arise.

The practice of the British Military Courts for instance, is amply demonstrated by the Belsen Trial proceedings,(4) and indeed the decisions of the Court in this trial had a strong influence on the British practice in subsequent trials. The opening words of Regulation 8 (i) of the British Royal Warrant(5) are moreover substantially the same as Article 9 (1) of the Australian War Crimes Act of October 11th, 1945, and the provisions of Regulation 8 (i) as a whole are essentially the same as those of Regulations 10 (1) and (2) re-enacted under the Canadian War Crimes Act of 31st August, 1946, it being stated again that it is the duty of the Court to judge the weight to be attached to any evidence given in pursuance of this provision which would not otherwise be admissible.

A few words may be added on affidavit and hearsay evidence in particular. The Defence in the Yamashita Trial directed more objections against affidavits and items of hearsay evidence than against any other type of evidence. It is true that these types of evidence cannot be subjected to cross-examination in the same way as the first hand evidence of a witness in court, yet in these particular aspects also the attitude of the Commission trying the case, and of the draftsmen who produced the regulations which bound its proceedings, is paralleled by the practice of other Anglo-Saxon countries. In the Belsen Trial, for instance, a large number of affidavits were admitted and also much hearsay evidence, including some contained in the affidavits themselves.(6)

During the trial of Erich Killinger and four others by a British Military Court, Wuppertal, 26th November–3rd December, 1945,(7) before the tendering of the affidavit evidence for the Prosecution, the Defence applied for one

(1) See pp. 46, 48, 50, 57 and 61.
(2) Loc cit, p. 405.
(3) Regarding the rules of evidence followed by United States Military Commissions, Military Government Courts and Military Tribunals, see Volume III of this series, pp. 109-111, 117 and 118.
(4) See Volume II of this series, pp. 129 *et seq.*
(5) *Ibid*, pp. 130-131.
(6) See Volume II of this series, pp. 131-38.
(7) See Volume III of this series, pp. 67-75.

deponent to be produced in person. The Defence had been given to understand that the British officer in question would be available for questioning. The Court decided, after hearing argument, that the deponent could not be produced " without undue delay " (in the wording of Regulation 8 (i) (a)), and the President of the Court added the significant statement that " we realise that this affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a Court, due weight." The President's words may fairly be taken as a reference to the fact that if evidence is given by means of an affidavit the person providing the evidence is not present in Court to be examined, cross-examined and re-examined.

Nevertheless, in his summing up, the Judge Advocate in the trial of Karl Adam Golkel and thirteen others, by a British Military Court, Wuppertal, Germany, 15th–21st May, 1946,(1) stressed that: " There is no rule that evidence given in the witness box must be given more weight than evidence, statements, taken on oath outside the court. As I said earlier, take into account all the circumstances . . . "

The Continental practice tends to prefer not to make special rules of evidence applicable to war crime trials, yet often the result is the same, the Courts not being bound by rules of evidence of a highly technical nature. For instance, the Ordinance of 28th August, 1944, under which trials by French Military Tribunals are held, makes no special provisions regarding evidence and procedure, and the rules contained in the *Code de Justice Militaire*, which govern trials of French military personnel, are applied.(2) Article 82 of the Code, on which the Presiding Judge in the Wagner Trial relied in ordering certain documents to be filed with the records of the case,(3) provides however that:

> " The President shall possess a discretionary power over the conduct of the proceedings and the elucidation of the truth.
>
> " He may, during the course of the proceedings, cause to be produced any piece of evidence which seems to him of value in the finding of the facts and he may call, even by means of a summons, any person whom it may seem to him necessary to hear . . . "

It is also significant that such special rules of evidence as have been made for the conduct of war crime trials by courts set up by continental countries have tended to relax the rules of evidence binding on those courts. Thus, the Norwegian Law No. 2 of 21st February, 1947, which governs the procedure of Norwegian War Crimes Trials, has made, on the matter of evidence, only one departure from the ordinary civil court procedure of Norway,(4) but this provides that, during the main hearing of war crimes cases, previous statements of witnesses, whether given before a court or not, may be read and used as evidence if the statement has been given by a person who has since died or disappeared or whose personal appearance is impossible to arrange or would cause considerable delay or expense. Again, paragraph

(1) To be reported in Volume V of this series.
(2) See volume III of this series, pp. 97-9
(3) *Ibid*, p. 39.
(4) *Ibid*, pp. 87 and 88.

28 (1) of the Czechoslovak Law of 24th January, 1946, which concerns the punishment of war criminals and traitors by Extraordinary People's Courts, provides that: " . . . The examination of the accused and the taking of evidence shall be conducted in general in accordance with the ordinary rules of criminal procedure. Verbatim reports of the interrogation of accomplices and witnesses and the views of experts may be read *whenever the president of the senate considers this suitable.*"(1) Such verbatim reports as those mentioned in the second sentence of this provision would be admissible in other than war crimes proceedings only with the consent of both Prosecution and Defence, if at all.

The Anglo-Saxon drafting technique is reflected in the wording of the Charters of the International Military Tribunals. Article 13 (Evidence) of the Charter of the International Military Tribunal for the Far East provides, *inter alia*, as follows:

> " a. *Admissibility*. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible."

With the exception of the omission of the final sentence, Article 19 of the Charter of the Nuremberg International Military Tribunal has the same wording.

In general it may be said that the rules of evidence applied in war crime trials are less technical than those governing the proceedings of courts conducting trials in accordance with the ordinary criminal law. This is not to say that any unfairness is done to the accused ; the aim has been to ensure that no guilty person will escape punishment by exploiting technical rules. The circumstances in which war crime trials are often held make it necessary to dispense with certain such rules. For instance many eye witnesses whose evidence was needed in trials in Europe had in the meantime returned to their homes overseas and been demobilised. To transport them to the scene of trial would not have been practical, and it was for that reason that affidavit evidence was permitted and so widely used.

Furthermore, it should be pointed out that the historic function of many of the stricter rules of evidence such as the rule against hearsay was to protect juries from evidence which had not been subjected to cross-examination and the value of which, owing to their inexperience, they might not be able properly to assess. It has been argued with justification, however, that the judges serving on war crime courts are less likely to need such protections than is the average juryman and that many of the stricter rules therefore lose their *raison d'être*.

4. THE STRESS PLACED BY THE COMMISSION ON THE NEED FOR EXPEDITIOUS PROCEDURE

The dissenting judgments of Mr. Justice Rutledge and Mr. Justice Murphy claimed that the trial of Yamashita had been conducted with undue haste and quoted as proof, *inter alia*, the attitude taken by the Commission to

(1) Italics inserted.

the Defence's repeated requests for a continuance.(1) The Commission made no secret of its desire to conduct the trial as expeditiously as possible, and the following statement made by the President of the Commission on 12th November, 1945, is worth quoting as an indication of this wish :

> " The Commission will grant a continuance only for the most urgent and unavoidable reasons. The trial has now consumed two weeks of time. The Prosecution indicates that this week will be required to finish its presentation. Early in the trial the Commission invited Senior Defence Counsel to apply for additional assistants in such numbers as necessary to avoid the necessity for a continuance. The offer has been extended from time to time throughout the trial. The Commission is still willing to ask that additional counsel be provided for we do not wish to entertain a request for a continuance. The Commission questions either the necessity or desirability for all members of counsel being present during all of the presentation of the case for the Prosecution. We feel that one or two members of the Defence staff in the courtroom is adequate and that the remaining member or members should be out of the courtroom performing specific missions for Senior Counsel. It directs both Prosecution and Defence to so organise and direct the preparation and presentation of their cases, including the use of assistants, to the end that need to request a continuance may not arise.
>
> " As a further means of saving time both Prosecution and Defence are directed to institute procedures by which the Commission is provided essential facts without a mass of non-essentials and immaterial details. We want to know (1) what was done, (2) where it was done, (3) when it was done, (4) who was involved. Go swiftly and directly to the target so the Commission can obtain a clear-cut and accurate understanding of essential facts. Cross-examination must be limited to essentials and avoid useless repetition of questions and answers already before the Commission. We are not interested in trivialities or minutiæ of events or opinions. Except in unusual or extremely important matters the Commission will itself determine the credibility of witnesses. Extended cross-examinations which savour of fishing expeditions to determine possible attacks upon the credibility of witnesses serve no useful purpose and will be avoided."

The Pacific Regulations of 24th September, 1945, which governed the proceedings of the Commission, provide, in Regulation 13 (*a*) and (*b*) that :

> " 13. CONDUCT OF THE TRIAL. A Commission shall :
>
> (*a*) Confine each trial strictly to a fair, expeditious hearing on the issues raised by the charges, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference.
>
> (*b*) Deal summarily with any contumacy or contempt, imposing any appropriate punishment therefor."(2)

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(1) See pp. 10, 15, 50, 54 and 62.

(2) Substantially the same provisions are made by the United States Pacific December Regulations and China Theatre Regulations and by Ordinance No. 7 of the Military Government of the United States Zone of Germany. (Regarding the United States war crimes law and practice in general, see Volume III of this series, pp. 103-20).

Like the introduction of more elastic rules of evidence into the proceedings of the Commission, this desire for expedition is again not without parallel in other systems of war crime courts; indeed it may be regarded as a characteristic of trials by military tribunals. Article 18 of the Charter of the Nuremberg International Military Tribunal makes the following provisions, which are substantially the same as those of Article 12 (*a*)–(*c*) of the Charter of the International Military Tribunal for the Far East:

"Art. 18. The Tribunal shall

(*a*) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,

(*b*) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(*c*) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges."

No analogous provisions are made in the Regulations governing war crime trials held before British Military Courts, but the following statement made by the Judge Advocate just before the opening of the case for the Prosecution in the Trial of Heinrich Klein and 15 others by a British Military Court at Wuppertal, 22nd–25th May, 1946, shows the existence of the same underlying desire to continue justice with expedition:

"Experience of these courts has shown that trials are taking too long. It is not suggested that there has been any obstruction; on the contrary, the court has much appreciated the assistance and co-operation which it has received from counsel for the defence. It happens, however, inevitably that a large number of accused usually means that there is a considerable amount of repetition. It is therefore necessary for the main defence to be conducted by one counsel on behalf of all. Other counsel will, of course, be permitted to add where they so wish, but it must be clearly understood that the main burden must fall on one counsel, whoever counsel for the defence like to select among themselves. Any further questions or speeches after the leading counsel must be limited to the sole question of the participation of their particular client or degree of responsibility.

"No attempt will be made, of course, to prevent anything being said which is in the interests of justice, but we wish to proceed with the greatest possible speed, because there are large numbers of other persons awaiting trial, and it is unfair that they should be kept in custody without trial longer than can be helped.

"The court feel, therefore, that they can rely upon the help of counsel for the defence in disposing of these cases as quickly as possible."

5. THE RESPONSIBILITY OF A COMMANDER FOR OFFENCES COMMITTED BY HIS TROOPS

(i) *The Issue in the Yamashita Trial*

Immediately after the hearing of the evidence for the Prosecution, the Defence put forward a plea of no case to answer and asked the Commission

to find the accused not guilty. During the ensuing argument, the Prosecutor stated: " The record itself strongly supports the contention or conclusion that Yamashita not only permitted but ordered the commission of these atrocities. However, our case does not depend upon any direct orders from the accused. It is sufficient that we show that the accused " permitted " these atrocities . . . With respect to the accused having permitted atrocities, there is no question that the atrocities were committed in the Philippines on a widespread scale; notorious, tremendous atrocities; thousands of people massacred; men, women and children; babes in arms; defenceless, unquestionably non-combatants. Who permitted them? Obviously the man whose duty it was to prevent such an orgy of planned and obviously deliberate murder, rape and arson—the commander of those troops! "

The main allegation of the Prosecution therefore was that Yamashita was guilty of a breach of the Laws of War in that he *permitted* the perpetration of certain offences. As has been seen, the Defence denied that this charge constituted an accusation of a breach of the Laws of War,(1) and the discussion in the Supreme Court, in so far as it turned on matters of substantive law, constituted on examination of that denial.(2)

(ii) *Liability of Officers for Offences Shown to have been Ordered by Them*

There have been many trials in which an officer who has been shown to have ordered the commission of an offence has been held guilty of its perpetration.

One example among many is the trial of General Anton Dostler, by a United States Military Commission, Rome, 8th–12th October, 1945, in which the accused was found guilty of having ordered the illegal shooting of fifteen prisoners of war.(3)

While the principle of the responsibility of such officers is not in doubt, it is nevertheless interesting to note that it has even been specifically laid down in certain texts which have been used as authorities in war crime trials. For instance, paragraph 345 of the United States Basic Field Manual, F.M. 27–10, in dealing with the admissibility of the defence of Superior Orders, ends with the words: " . . . The person giving such orders may also be punished."

(iii) *Liability of a Commander for Offences Not Shown to have been Ordered by Him*

The more interesting question, however, is the extent to which a commander of troops can be held liable for offences committed by troops under his command which he has not been shown to have ordered, on the grounds that he ought to have used his authority to prevent their being committed or their continued perpetration, or that he must, taking into account all the circumstances, be presumed to have either ordered or condoned the offences. The extent to which such liability can be admitted is not easy to lay down, either legally or morally.

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(1) See pp. 7 and 11.
(2) See pp. 42-4, 51-4, 57 and 58-61.
(3) See Volume I of this series, pp. 22-34.

(iv) *A Classification of the Relevant Trials and Legal Provisions*

The law on this matter is still developing and it would be wrong to expect to find hard and fast rules in universal application. In the circumstances it is inevitable that considerable discretion is left in the hands of the Courts to decide how far it is reasonable to hold a commander responsible for such offence of his troops as he has not been explicitly proved to have ordered. The relevant trials and municipal law enactments may be classified under the following two categories :

(i) material illustrating how, on proof of certain circumstances, the burden of proof is shifted, so as to place on an accused the task of showing to the satisfaction of the Court that he was not responsible for the offences committed by his troops,

(ii) material actually defining the extent to which a commander may be held responsible for his troops' offences.

The first type of material relates to a matter of evidence, the second type to a matter of substantive law.

(v) *Trials and Provisions Relevant to the Question of the Burden of Proof*

Of interest in connection with the shifting of the burden of proof are Regulations 10 (3) (4) and (5) of the War Crimes Regulations (Canada),(1) and Regulation 8 (ii) of the British Royal Warrant which makes a provision similar to Article 10 (3) of the Canadian provisions :

> " Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime."

The three reports which follow the present report in this Volume are also of interest. During the *Trial of Kurt Meyer* the Court heard not only a discussion of the effect of Regulation 10 (3) (4) and (5),(2) but also some remarks on the part of the Judge Advocate on the proving by circumstantial evidence of the giving of a *direct order*.(3) The arguments quoted on pp. 123–4, from the *Trial of Kurt Student* are of the same kind. Of particular interest is the stress placed on the repeated occurrence of offences by troops under one command as *prima facie* evidence of the responsibility of the commander for those offences.(4) The *Trial of Karl Rauer and Six Others*(5) seems to suggest that responsibility may be inferred from surrounding circumstances, including the prevailing state of discipline in an army. It is also worthy of note that the participation in offences of officers standing in the chain of command between an accused commander and the main body

(1) See pp. 128-9.

(2) See pp. 107-8 and 110-11.

(3) See p. 108.

(4) See p. 123, and compare Regulation 10 (4) of the Canadian Regulations, cited on p. 128. For an example of the same line of thought in the Yamashita Trial, see pp. 17 and 34.

(5) See pp. 113-17.

of his troops may be regarded as some evidence of the responsibility of the commander for the offences of those troops. (Compare the words of the Commission which tried Yamashita, set out on pages 34 and 35). Regulation 10 (5) of the Canadian Regulations makes it possible for a Court to regard even the *presence* of an officer at the scene of the war crime, either at or immediately before its commission, as *prima facie* evidence of the responsibility not merely of the officer but also of the commander of the formation, unit, body or group whose members committed the crime.(1)

Regulation 8 (ii) of the British Royal Warrant, like Regulation 10 (3) of the Canadian Regulations, may be applied so as to enable suitable evidence to be introduced as *prima facie* evidence of a commander's responsibility in the same way as it may be as evidence of the responsibility of any other member of a unit or group. For a discussion during the *Belsen Trial* of the application of Regulation 8 (ii) and of the possible operation against Kramer, Kommandant of Belsen Concentration Camp, reference should be made to pages 140–141 of Volume II of this series.

(vi) *Trials and Provisions Relevant to the Question of Substantive Law*

It is clearly established that a responsibility may arise in the absence of any direct proof of the giving of an order for the commission of crimes. Three trials by United States Military Commissions in the Far East illustrate the principle that a duty rests on a commander to prevent his troops from committing crimes, the *omission* to fulfil which would give rise to liability. Shiyoku Kou was sentenced to death by a Military Commission in Manila, on 18th April, 1946, after being found guilty of " unlawfully and wilfully " disregarding, neglecting and failing to discharge his duties as Major-General and Lieutenant-General by " permitting and sanctioning " the commission of murder and other offences against prisoners of war and civilian internees.

The second relevant United States Trial is that of Yuicki Sakamoto, held at Yokohama, Japan, on 13th February, 1946. The accused was sentenced to life imprisonment after being found guilty on a charge alleging that he " between 1st January, 1943, and 1st September, 1945, at a prisoner-of-war camp Fukuoka 1, Fukuoka, Kyushu, Japan, did commit cruel and brutal atrocities and failed to discharge his duty as Commanding Officer in that he permitted members of his command to commit cruel and brutal atrocities."

A charge entitled Neglect of Duty in Violation of the Laws and Customs of War was brought against Lt.-General Yoshio Tachibana and Major Sueo Matoba of the Imperial Japanese Army and against Vice-Admiral Kunizo Mori, Captain Shizuo Yoshii and Lt. Jisuro Sujeyoshi of the Imperial Japanese Navy, in their trial by a United States Military Commission at Guam, Marianas Islands, in August, 1946. The Specifications appearing under this charge alleged that various of the above accused unlawfully disregarded, neglected and failed to discharge their duty, as Commanding General and other respective ranks, to control members of their commands and others under their control, or properly to protect prisoners of war, in that they permitted the unlawful killing of prisoners of war, or permitted persons under their control unlawfully to prevent the honourable burial of prisoners of war by mutilating their bodies or causing them to be mutilated or by eating flesh from their bodies. The Prosecution

(1) See p. 129.

claimed that there had been an *intentional* omission to discharge a legal duty. All of the accused mentioned above were found guilty of the charge alleging neglect of duty, and although a sentence of life imprisonment was the highest penalty imposed by the Commission on an accused sentenced on this charge alone, the trial does serve as further proof that neglect on the part of a higher officer of a duty to restrain troops and other persons under his control can render the officer himself guilty of a war crime when his omission has lead to the commission of such a crime.

Appearing before Australian Military Courts sitting at Rabaul, General Hitoshi Imamura and Lt.-General Masao Baba were found guilty of committing war crimes in that each " unlawfully disregarded and failed to discharge his duty as a Commander to control the members of his command, whereby they committed brutal atrocities and other high crimes against the people of the Commonwealth of Australia and its Allies." The former accused was sentenced to imprisonment for ten years by a Military Court sitting from 1st to 16th May, 1947 ; the latter to death by a similar Court sitting from 28th May to 2nd June, 1947. Terms of imprisonment have also been awarded in various other trials before Australian Military Courts in which alleged war criminals were found guilty of offences of the same category.

The principles governing this type of liability, however, are not yet settled. The question seems to have three aspects :

(i) How far can a commander be held liable for not taking steps before the committing of offences, to prevent their possible perpetration ?
(ii) How far must he be shown to have known of the committing of offences in order to be made liable for not intervening to stop offences already being perpetrated ?
(iii) How far has he a duty to discover whether offences are being committed ?

Certain relevant provisions of municipal law exist. Thus, Article 4 of the French Ordinance of 28th August, 1944, Concerning the Suppression of War Crimes,(1) provides that :

> " Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates."

In a similar manner, Article 3 of Law of 2nd August, 1947, of the Grand Duchy of Luxemberg, on the Suppression of War Crimes, reads as follows :

> " Without prejudice to the provisions of Articles 66 and 67 of the *Code Pénal*, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and delicts set out in Article 1 of the present Law: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided these crimes or delicts."

(1) Regarding the French Law concerning trials of war criminals by Military Tribunals and Military Government Courts in the French Zone of Germany, see Volume III of this series, pp. 93-102.

Article IX of the Chinese Law of 24th October, 1946, Governing the Trial of War Criminals, states that:

> " Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals."

A special provision was also made in the Netherlands relating to the responsibility of a superior for war crimes committed by his subordinates. The Law of July 1947, adds, *inter alia*, the following provision to the Extraordinary Penal Law Decree of 22nd December, 1943:

> " *Article* 27 (a) (3): Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2."

It will be seen that the French enactment mentions only crimes " organised or tolerated," the Luxembourg provision only those " tolerated " and the Netherlands enactment only those " deliberately permitted." A reference to an element of knowledge enters into the drafting of each of these three texts.

The Chinese enactment does not define the extent of the duty of commanders " to prevent crimes from being committed by their subordinates," but the extent to which the Chinese Courts have been willing to go in pinning responsibility of this kind on to commanders was shown by the Trial of Takashi Sakai by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, 27th August, 1946. The accused was sentenced to death after having been found guilty, *inter alia*, of " inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants; to rape, plunder, deport civilians; to indulge in cruel punishment and torture; and to cause destruction of property." The Tribunal expressed the opinion that it was an accepted principle that a field Commander must hold himself responsible for the discipline of his subordinates. It was inconceivable that he should not have been aware of the acts of atrocity committed by his subordinates during the two years when he directed military operations in Kwantung and Hong Kong. This fact had been borne out by the English statement made by a Japanese officer to the effect that the order that all prisoners of war should be killed, was strictly enforced. Even the defendant, during the trial, had admitted a knowledge of murder of prisoners of war in the Stevensons Hospital, Hong Kong. All the evidence, said the Tribunal, went to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war.

It will be noted that the Tribunal pointed out that the accused must have known of the acts of atrocities committed by his subordinates; the question is therefore left open whether he would have been held guilty of breach of duty in relation to acts of which he had no knowledge.

A British Military Court at Wuppertal, 10th and 11th July, 1946, sentenced General Victor Seeger to imprisonment for three years on a charge of being concerned in the killing of a number of Allied prisoners of war; the Judge Advocate said of this accused: " The point you will

have to carefully consider—he is not part of any organisation at all—is: was he concerned in the killing, in the sense that he had a duty and had the power to prevent these people being dealt with in a way which he must inevitably have known would result in their death . . . it is for you with your members, using your military knowledge going into the whole of this evidence to say whether it is right to hold that General Seeger, in this period between, let us say the middle of August or towards the end of August, was holding a military position which required him to do things which he failed to do and which amounted to a war crime in the sense that they were in breach of the Laws and Usages of War." The Judge Advocate thus made it clear that a commander could be held to have occupied a military position which required him to take certain measures, the failure to take which would amount to a war crime. Yet it seems implicit in the Judge Advocate's words that some kind of knowledge on the accused's part was necessary to make him guilty.

The three trials reported later in this Volume also provide, *inter alia*, some evidence that an accused must have had knowledge of the offences of his troops.

Thus, in the Trial of Student, Counsel and the Judge Advocate spoke in terms of " General Student's general policy," of no bomb being dropped " without Student knowing why " and of the troops believing either that the offences had been ordered by the commander or that their offences would be " condoned and appreciated."(1) It is to be noted that the possibility of Student being made liable *in the absence of knowledge*, on the grounds that he ought to have found out whether offences were being committed or were likely to be committed, or that he ought to have effectively prevented their occurrence, is not mentioned.

In the Trial of Kurt Meyer, the Judge Advocate stated that anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, *or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent*, the killing of prisoners, were matters affecting the question of the accused's responsibility.(2)

Here it will be noted that the possibility of a commander being held responsible for offences on the grounds that he ought to have provided against them before their commission is not ruled out.

The Judge Advocate in the Trial of Rauer and Others, however, stated that the words, contained in the charge against Rauer, " concerned in the killing " were a direct allegation that he either instigated murder or condoned it. *The charge did not envisage negligence.*(3)

The *Trial of Field Marshal Erhard Milch* by a United States Military Tribunal at Nuremberg,(4) from 2nd January, 1947, to 17th April, 1947, is also of interest in this connection.

The Judgment of the Court on count two, which alleged that the defendant was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving

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(1) See pp. 123-4. (2) See p. 108. (3) See p. 116.
(4) To be reported in greater detail in a subsequent volume of these reports.

medical experiments without the subjects' consent, in the course of which experiments, the defendant, with others, perpetrated murders, brutalities, cruelties, tortures and other inhuman acts, includes the following passage:

> " In approaching a judicial solution of the questions involved in this phase of the case, it may be well to set down *seriatim* the controlling legal questions to be answered by an analysis of the proof:
>
> (1) Were low-pressure and freezing experiments carried on at Dachau?
>
> (2) Were they of a character to inflict torture and death on the subjects ?
> (The answer to these two questions may be said to involve the establishment of the *corpus delicti.*)
>
> (3) Did the defendant personally participate in them ?
>
> (4) Were they conducted under his direction or command ?
>
> (5) Were they conducted with prior knowledge on his part that they might be excessive or inhuman ?
>
> (6) Did he have the power or opportunity to prevent or stop them ?
>
> (7) If so, did he fail to act, thereby becoming *particeps criminis* and accessory to them ? "

The Court later expressed the following conclusions, having declared the *corpus delicti* to be proved:

> " (3) The Prosecution does not claim (and there is no evidence) that the defendant personally participated in the conduct of these experiments.
>
> " (4) There is no evidence that the defendant instituted the experiments or that they were conducted or continued under his specific direction or command. . . .
>
> " (5) Assuming that the defendant was aware that experiments of some character were to be launched, it cannot be said that the evidence shows any knowledge on his part that unwilling subjects would be forced to submit them or that the experiments would be painful and dangerous to human life. It is quite apparent from an over-all survey of the proof that the defendant concerned himself very little with the details of these experiments. It was quite natural that this should be so. His most pressing problem involved the procurement of labour and materials for the manufacture of airplanes. . . .
>
> " (6) Did the defendant have the power or opportunity to prevent or stop the experiments ? It cannot be gainsaid that he had the authority to either prevent or stop them in so far as they were being conducted under the auspices of the Luftwaffe. It seems extremely probable, however, that, in spite of him, they would have continued under Himmler and the S.S. But certainly he had no opportunity to prevent or stop them, unless it can be found that he had guilty knowledge of them, a fact which has already been determined in the negative. . . .
>
> " (7) In view of the above findings, it is obvious that the defendant never became *particeps criminis* and accessory in the low-pressure experiments set forth in the second count of the indictment.

" As to the other experiments, involving subjecting human being to extreme low temperatures both in the open air and in water, the responsibility of the defendant is even less apparent than in the case of the low-pressure experiments. . . ."

It will be seen that the accused was held not guilty of being implicated in the conducting of the illegal experiments referred to because the Tribunal was not satisfied that he knew of their illegal nature ; no duty to find whether they had such a nature is mentioned.

Some support is given, however, to the view that a commander has a duty, not only to prevent crimes of which he has knowledge or which seem to him likely to occur, but also to take reasonable steps to discover the standard of conduct of his troops, and it may be that this view will gain ground.

The Supreme Court of the United States held that General Yamashita had a duty to " take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population," that is to say to prevent offences against them from being committed. The use of the terms " appropriate in the circumstances " serves to underline the remark made previously, namely, that a great discretion is left to the Court to decide exactly where the responsibility of the commander shall cease, since no international agreement or usage lays down what these measures are. The Commission which tried Yamashita seemed to assume that he had had a duty to " *discover* and control " the acts of his subordinates, (see p. 35), and the majority judgment of the Supreme Court would appear to have left open the possibility that, in certain circumstances, such a duty could exist. In dissenting, Mr. Justice Murphy expressed the opinion that : " Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different."

Some passages from the judgment of the United States Military Tribunal which tried Karl Brandt and Others at Nuremberg, from 9th December, 1946, to 20th August, 1947, are relevant here.(1) The evidence before the Tribunal had shown that, by a decree dated 28th July, 1942, and signed by Hitler, Keitel and Lammers, Brandt was appointed Hitler's Plenipotentiary for Health and Medical Services, with high authority over the medical services, military and civilian, in Germany. The judgment states :

" Certain Sulfanilamide experiments were conducted at Ravensbruck for a period of about a year prior to August 1943. These experiments were carried on by the defendants Gabhardt, Fischer, and Oberhauser—Gebhardt being in charge of the project. At the third meeting of the consulting physicians of the Wehrmacht held at the Military Medical Academy in Berlin from 24th to 26th May, 1943, Gebhardt and Fischer made a complete report concerning these experiments. Karl Brandt was present and heard the reports. Gebhardt testified that he made a full statement concerning what he had done, stating that experiments had been carried out on human beings. The evidence is convincing that statements were also made that the persons experimented upon were concentration camp inmates. It was stated that 75 persons had

(1) " The Doctors Trial," to be reported upon in a later volume of this report.

been experimented upon, that the subjects had been deliberately infected, and that different drugs had been used in treating the infections to determine their respective efficacy. It was also stated that three of the subjects died. It nowhere appears that Karl Brandt made any objection to such experiments or that he made any investigation whatever concerning the experiments reported upon, or to gain any information as to whether other human subjects would be subjected to experiments in the future. *Had he made the slightest investigation*, he could have ascertained that such experiments were being conducted on non-German nationals, without their consent, and in flagrant disregard of their personal rights ; and that such experiments were planned for the future.

" In the medical field Karl Brandt held a position of the highest rank directly under Hitler. *He was in a position to intervene* with authority on all medical matters ; indeed, it appears that such was his positive duty. It does not appear that at any time he took any steps to check medical experiments upon human subjects. During the war he visited several concentration camps. *Occupying the position he did* and being a physician of ability and experience, *the duty rested upon him* to make some *adequate investigation* concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps."(1)

Similarly, of the accused Handloser, who had been Chief of the Wehrmacht Medical Services and Army Medical Inspector, it is said :

" The entries in the Ding Diary clearly indicate an effective liaison between the Army Medical Inspectorate and the experiments which Ding was conducting at Buchenwald. There is also credible evidence that the Inspectorate was informed of medical research carried on by the Luftwaffe. These experiments at Buchenwald continued after Handloser had gained actual knowledge of the fact that concentration camp inmates had been killed at Dachau as the result of freezing ; and that inmates at Ravensbruck had died as victims of the sulfanilamide experiments conducted by Gebhardt and Fischer. Yet with this knowledge Handloser in his superior medical position made *no effort to investigate* the situation of the human subjects or to exercise any proper degree of control over those conducting experiments within his field of authority and competence.

" *Had the slightest inquiry been made* the facts would have revealed that in vaccine experiments already conducted at Buchenwald, deaths had occurred—both as a result of artificial infections by the lice which had been imported from the Typhus and Virus Institutes of the OKH at Cracow or Lemberg, or from infections by a virulent virus given to subjects after they had first been vaccinated with either the Weigl, Cox-Haagen-Gildemeister, or other vaccines, whose efficacy was being tested. Had this step been taken, and had Handloser exercised his authority, later deaths would have been prevented in these particular experiments which were originally set in motion through the offices of the Medical Inspectorate and which were being conducted for the benefit of the German armed forces.

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(1) Italics inserted.

"These deaths not only occurred with German nationals, but also among non-German nationals who had not consented to becoming experimental subjects."(1)

In like manner it is said that the accused Genzken, who was Gruppenfuehrer and Generalleutnant in the Waffen S.S., "knew the nature and scope of the activities of his subordinates, Mrugowsky and Ding, in the field of typhus research ; yet he did nothing to ensure that such research would be conducted within permissible legal limits. He knew that concentration camp inmates were being subjected to cruel medical experiments in the course of which deaths were occurring ; yet he took no steps to ascertain the status of the subjects or the circumstances under which they were being sent to the experimental block. Had he made the slightest inquiry he would have discovered that many of the human subjects used were non-German nationals who had not given their consent to the experiments.

"As the Tribunal has already pointed out in this Judgment, 'the duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.'"

For these and other reasons, each of the three accused named above was found guilty of war crimes and crimes against humanity. Brandt was sentenced to death and the other two to imprisonment for life.

More generally, in connection with the guilt of Handloser and the accused Schroeder (who was also found guilty of war crimes and crimes against humanity and sentenced to life imprisonment) it was recalled that, for the reasons given by the Supreme Court in the Yamashita proceedings, "the Law of War imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the Law of War."

Basing their argument on the words of the Tribunal in the Trial of Karl Brandt and Others, which are quoted above in relation to the guilt of Brandt, Handloser and Genzken, the Prosecution in its opening statement in the Trial of Carl Krauch and Others before a United States Military Tribunal in Nuremberg (The I.G. Farben Trial)(2) made the following claim :

"Moreover, even where a defendant may claim lack of actual knowledge of certain details, there can be no doubt that he could have found out had he, in the words of Military Tribunal No. 1, made 'the slightest investigation.' Each of the defendants, with the possible exception of the four who were not Vorstand members, was in such a position that he either knew what Farben was doing in Leuna, Bitterfeld, Berlin, Auschwitz, and elsewhere, or, if he had no actual knowledge of some particular activity, again in the words of Military Tribunal

(1) Italics inserted.

(2) This trial began on 27th August, 1947, and will be reported in a later volume of these reports.

No. 1, ' occupying the position that he did, *the duty rested upon him to make some adequate investigation.*'(1) One cannot accept the prerogatives of authority without shouldering responsibility."

It has also been said that an accused may not always rely on the fact that battle conditions prevented him from maintaining control over his troops ; their previous training should be such as to ensure discipline. In his editorial comment on the Yamashita proceedings,(2) Professor Quincy Wright has said :

" The issue is a close one, but it would appear that International Law holds commanders to a high degree of responsibility for the action of their forces. They are obliged to so discipline their forces that members of those forces will behave in accordance with the rules of war even when military circumstances in considerable measure eliminate the practical capacity of the commander to control them."

Yamashita's long years of experience may have constituted a damning factor. Had he been an inexperienced officer or immature in years, his liability may have been considered as being proportionately less.

However that may be, there can be no doubt that the widespread nature of the crimes committed by the troops under Yamashita's command was a factor which weighed heavily against the accused. An occasional or solitary act of brutality, rape or murder might, through the exigencies of combat conditions, be easily overlooked by even the most zealous of disciplinarians, and his failure to note or punish that act would not necessarily be considered as showing a lack of diligence on his part. It proved impossible, however, to escape the conclusion that accused either knew or had the means of knowing of the widespread commission of atrocities by members and units of his command ; his failure to inform himself through the official means available to him of what was common knowledge throughout his command and throughout the civilian population, could only be considered as a criminal dereliction of duty on his part. The crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either *prima facie* evidence that the accused *knew* of their perpetration,(3) or evidence that he must have failed to fulfil a duty to *discover* the standard of conduct of his tropps.(4)

Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded means of knowledge as being the same as knowledge itself. This presumption has been defined as follows :

" Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him. . . . In other words, whatever fairly puts a person on inquiry is

(1) Italics inserted.
(2) Loc cit., p. 404.
(3) Cf. p. 85 concerning the burden of proof in such cases as this.
(4) Cf. p. 91.

sufficient notice where the means of knowledge are at hand ; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice ; he does wrong not to heed to ' signs and signals ' seen by him." (39 *Am. Jur.*, pp. 236–237, Sec. 12.)

It is clear that the knowledge that he might be made liable for offences committed by his subordinates even if he did not order their perpetration would in most cases act as a spur to a commander who might otherwise permit the continuance of such crimes of which he was aware, or be insufficiently careful to prevent such crimes from being committed. It is evident, however, that the law on this point awaits further elucidation and consolidation.

(vii) *The Problem of the Degree of Punishment to be Applied*

Under International Law, any war crime is punishable with death, but a lesser penalty may also be imposed. Thus even where a superior has been held responsible for the crimes of his subordinates he has not always been condemned to death. The punishment meted out, like the question of guilt itself, will depend upon the circumstances of each case. The Convening Authority who reviewed the Trial of Kurt Meyer commuted the death sentence passed on him to one of life imprisonment, on the grounds that Meyer's responsibility did not warrant the extreme penalty.(1) The sentence of death passed on Karl Rauer was also commuted to one of life imprisonment,(2) and the sentence passed on Kurt Student (which was not confirmed) was one of five years' imprisonment.(3) Again, the highest penalty imposed for breach of duty alone in the Trial of Lt.-General Yoshio Tachibana(4) was the sentence of life imprisonment passed on Vice-Admiral Mori.

In the Trial of Oberregierungsrat Ernst Weimann and Others, the Supreme Court of Norway decided that a police chief, who knew that the torture inflicted by his subordinates on Norwegian prisoners was causing deaths, should suffer not death but penal servitude for life on the grounds that he himself took no part in the ill-treatment of prisoners and that the district under his jurisdiction was too wide to allow him to follow each individual case personally. The defendant Weimann came to Norway in July 1944, as chief of the German Sipo in Bergen. He was also in charge of the Aussendienststellen of Hoyanger in Odda, Aardalstangen and Florö. He was charged before the Gulating Lagmannsrett in September 1946, with having given permission for the employment of the method of " verschärfte Vernehmung," an illegal form of torture, in the interrogation of 23 named Norwegian prisoners, one of whom was a woman. In two cases the torture was so severe that the prisoners died from the after-effects of the ill-treatment. The Court found that though he himself had not taken part in the ill-treatment of prisoners, he was a judge by profession and ought to

(1) See p. 109.
(2) See p. 114.
(3) See p. 120.
(4) See pp. 86-7.

have realised more than anyone how wrong it was to tolerate torture when interrogating prisoners. The Court considered it a particularly aggravating circumstance that despite the fact that two prisoners had died as a result of " verschärfte Vernehmung," the defendant neither changed his methods nor denied his subordinates the use of torture. The Lagmannsrett sentenced this accused to death.

The Supreme Court on appeal (August 1947) altered the sentence to one of penal servitude for life. Judge Berger, delivering the opinion of the majority of the judges, said that though it had been found by the Lagmannsrett that the appellant had been aware of what his subordinates were doing, he himself had never ill-treated any of the prisoners. The appellant was chief of a large district where he was unable to follow each individual case personally. He had been apparently intent on following his own country's interests to the best of his understanding.

CASE NO. 22

THE ABBAYE ARDENNE CASE

TRIAL OF S.S. BRIGADEFÜHRER KURT MEYER

CANADIAN MILITARY COURT, AURICH, GERMANY
10TH–28TH DECEMBER, 1945

Incitement by Regimental Commander to his men to deny quarter to opposing troops. Extent of his responsibility for shooting of prisoners of war by men under his command.

Kurt Meyer was accused of having, as Commander of the 25th S.S. Panzer Grenadier Regiment of the 12th S.S. Panzer Division, incited and counselled his men to deny quarter to allied troops ; ordered (or alternatively been responsible for) the shooting of prisoners of war at his headquarters ; and been responsible for other such shootings both at his headquarters and during the fighting nearby. He pleaded not guilty. In connection with the last set of charges and with the alternative charge, the Prosecution referred to the presumptions contained in Regulations 10 (3), (4) and (5) of the War Crimes Regulations (Canada). The accused was found guilty of the incitement and counselling, and was held responsible for the shootings at his headquarters, though not guilty of ordering them, and was found not to be responsible for the shootings outside his headquarters. A charge contained in a second Charge Sheet was abandoned. The sentence of death passed against him was commuted by the Convening Authority to one of life imprisonment.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was convened by the General Officer Commanding the Canadian Occupation Force, 3rd Canadian Infantry Division, Major-General C. Vokes, C.B., C.B.E., D.S.O., pursuant to the War Crimes Regulations (Canada).

It consisted of Major-General H. W. Foster, C.B.E., D.S.O., G.O.C. 4 Cdn. Armd. Div., as President, and, as members, Brig. I. S. Johnston, D.S.O., E.D., T./G.O.C., 5 Cdn. Armd. Div. ; Brig. H. A. Sparling, D.S.O., C.R.A., 3 Cdn. Inf. Div. C.A.O.F. ; Brig. H. P. Bell-Irving, D.S.O., O.B.E.,

Comd. 10 Cdn. Inf. Bde., and Brig. J. A. Roberts, D.S.O., Comd. 8 Cdn. Inf. Bde. Lt.-Col. W. B. Bredin, D.J.A.G. 3 Increment " B " (C.A.O.F.), Canadian J.A.G. Overseas, was Judge Advocate. The Prosecutor was Lt.-Col. B. J. S. Macdonald, O.B.E., E.D., O.C. 1 Cdn. War Crimes Investigation Unit, and the Defending Officer was Lt.-Col. M. W. Andrew, D.S.O., O.C. The Perth Regt.

2. THE CHARGE

The Convening Officer directed that the accused be tried on two Charge Sheets. Pursuant to sub-section (1) of Section 4 of the War Crimes Regulations (Canada), Brigadier R. J. Orde, Judge Advocate-General, certified the case as approved for trial on the charges set out therein. At the conclusion of the trial on the first Charge Sheet, however, the approval of the Convening Officer was asked, and given, not to proceed with the second.

The accused pleaded not guilty to all the charges.

The following are the texts of the two Charge Sheets :

FIRST CHARGE SHEET

The Accused, BRIGADEFUHRER KURT MEYER, *an Officer in the former Waffen S.S., then a part of the Armed Forces of the German Reich, now in the charge of* 4 *Battalion, Royal Winnipeg Rifles, Canadian Army Occupation Force, Canadian Army Overseas, is Charged With :*

FIRST CHARGE COMMITTING A WAR CRIME

in that he

in the Kingdom of Belgium and Republic of France during the year 1943 and prior to the 7th day of June, 1944, when Commander of 25 S.S. Panzer Grenadier Regiment, in violation of the laws and usages of war, incited and counselled troops under his command deny quarter to Allied troops.

SECOND CHARGE : COMMITTING A WAR CRIME

in that he

in the Province of Normandy and Republic of France on or about the 7th day of June, 1944, as Commander of 25 S.S. Panzer Grenadier Regiment, was responsible for the killing of prisoners of war, in violation of the laws and usages of war, when troops under his command killed twenty-three Canadian prisoners of war at or near the Villages of BURON and AUTHIE.

THIRD CHARGE: COMMITTING A WAR CRIME

in that he

at his Headquarters at L'Ancienne Abbaye, Ardenne in the Province of Normandy and Republic of France on or about the 8th day of June, 1944, when Commander of 25 S.S. Panzer Grenadier Regiment, in violation of the laws and usages of war gave orders to troops under his command to kill seven Canadian prisoners of war, and as a result of such orders the said prisoners of war were thereupon shot and killed.

FOURTH CHARGE: COMMITTING A WAR CRIME
(Alternative to Third Charge)

in that he

in the Province of Normandy and Republic of France on or about the 8th day of June, 1944, as Commander of 25 S.S. Panzer Grenadier Regiment, was responsible for the killing of prisoners of war in violation of the laws and usages of war, when troops under his command shot and killed seven Canadian prisoners of war at his Headquarters at L'Ancienne Abbaye Ardenne.

FIFTH CHARGE: COMMITTING A WAR CRIME

in that he

in the Province of Normandy and Republic of France on or about the 7th day of June, 1944, as Commander of 25 S.S. Panzer Grenadier Regiment, was responsible for the killing of prisoners of war in violation of the laws and usages of war, when troops under his command killed eleven Canadian prisoners of war (other than those referred to in the Third and Fourth Charges) at his Headquarters at L'Ancienne Abbaye Ardenne.

SECOND CHARGE SHEET

The Accused, BRIGADEFUHRER KURT MEYER, *an Officer in the former Waffen S.S., then a part of the Armed Forces of the German Reich, now in the charge of* 4 *Battalion, Royal Winnipeg Rifles, Canadian Army Occupation Force, Canadian Army Overseas, is Charged With :*

CHARGE : COMMITTING A WAR CRIME

in that he

in the Province of Normandy and Republic of France on or about the 17th day of June, 1944, as Commander of 12 S.S. Panzer Division (Hitler-Jugend), was responsible for the killing of prisoners of war in violation of the laws and usages of war, when troops under his command killed seven Canadian prisoners of war at or near the Village of MOUEN.

3. THE OPENING OF THE CASE FOR THE PROSECUTION

The Prosecutor rested his case upon Articles 23 (*c*) and (*d*) of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, Articles 2 and 5 of the Geneva Convention of 1929 relative to the Treatment of Prisoners of War, and Articles 1 and 2 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. He referred also to Amendment No. 12 (1929) of the *Manual of Military Law*. The last, he said, contained a number of relevant provisions, many of which were simply restatements of the Hague and Geneva Conventions ; Paragraph 51, however, in dealing with the prohibition of the killing or wounding of an enemy who has laid down his arms and has no longer means of defence, stated that, " This prohibition is clear and distinct ; there is no question of the moment up to which acts of violence may be continued without disentitling the enemy to be ultimately admitted to the benefit of quarter. War is for the purpose of overcoming armed resistance and no vengeance can be taken because an individual has done his duty to the last but escaped injury."

The Prosecution contended that Meyer was responsible, either directly or due to " wilful or criminal negligence and failure of the accused to perform his duties as commander of the troops concerned," for the offences alleged in the first Charge Sheet.

Dealing with the first charge, the Prosecutor stated his opinion that there was sufficient evidence to show that Meyer had ordered his troops to deny quarter, but, he observed, " We have, however, to avoid any argument on that point, confined our charge to one simply of inciting and counselling, which of course, in any event, is a war crime."

Turning to the second charge, he pointed out that it was believed that at least one officer had participated in the mass shootings alleged to have taken place at Buron and Authie, and stated : " Apart from regulation (4), which makes this participation *prima facie* evidence of Meyer's responsibility,(1) he himself has admitted that he took an active part in leading this battle, and was well forward, as was his usual practice, in an effort to ' draw on ' his young troops in this, their first engagement. It will be

(1) By " regulation (4)," Counsel intended to signify number 10 (4) of the War Crimes Regulations (Canada). Regarding this provision, see pp. 110-12 and 128.

submitted that because of this the court can reasonably infer that the accused must share directly in the responsibility for what occurred. . . . The ferocity of this treatment of prisoners, its widespread character, and the large number of separate crimes, conveys a definite impression that there must have been preliminary incitement and approval given, or orders issued, and is therefore of assistance to the court in determining the responsibility of the accused on this particular charge.''

The Prosecutor indicated that whether the Court accepted the third or the fourth charge, which were alternatives, might turn in part on the weight which they placed on the evidence of a Polish youth named Jesionek. On these, and on the fifth charge, he summarised the evidence which he proposed to call.

4. THE EVIDENCE FOR THE PROSECUTION

Twenty-nine witnesses were called by the Prosecution. Further evidence included various pre-trial statements and affidavits and a considerable number of extracts from the proceedings of a SHAEF Court of Enquiry which had made a preliminary investigation of the case.

The evidence against the accused may be divided into four parts, comprising respectively that intended to prove, first the inciting and counselling alleged in the first Charge, secondly the shooting of prisoners of war by troops under his command in or near Buron and Authie alleged in Charge 2 and a connection between Meyer and these offences sufficient to make him responsible for them, thirdly the shootings at the headquarters alleged in Charges 3–5, and fourthly the giving of the orders by the accused alleged in third Charge.

In connection with the first charge, evidence was provided by four ex-members of the 25th S.S. Panzer Grenadier Regiment which had been under Meyer's command.[1]

The first, in a statement made previously before the SHAEF Court of Enquiry, which was read to the court, said that in April 1944, a Company Sergeant Major had read to him and the rest of the H.Q. Company, while on parade, certain secret orders, which the Company had had to sign, to signify that they understood them, and which included instructions that if prisoners were taken they were to be shot after interrogation.

The second witness acknowledged a pre-trial statement made to a war crimes investigation unit, in which he said that he had heard Meyer utter words to the effect that his regiment took no prisoners. On being questioned by the President of the Court, the witness said that in February or March 1944, orders that no prisoners should be taken had been read to his company by the same Company Sergeant Major as has previously been mentioned.

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[1] Acting under No. 10 (8) of the War Crimes Regulations (Canada), the President of the Court ruled that the names of the German witnesses should not be released to the press, in order to protect them against possible retaliation. In deference to this decision, the names of German witnesses are not given in these pages..

The third witness said that on 6th June, 1944, his platoon had heard a speech from a Company Commander to the effect that no prisoners should be taken and that he had been present when Meyer in a speech made late in 1943, at Beverloo, had said, " my regiment takes no prisoners." On being asked by defending counsel, however, whether Meyer had not actually said " I do not want any of my troops to be made prisoners," the witness replied that he was no longer able to give an answer to that question. He could not remember ever being told by any officer or N.C.O. to shoot prisoners. He remembered an order offering leave to soldiers who did take prisoners, and he thought that no punishment was meted out to those who took them. The speech at Beverloo was forgotten by himself and his comrades when they went into action.

The fourth of the witnesses referred to, Jan Jesionek, a Polish youth who had been conscripted into the 12th S.S. Panzer Division, told how the accused had made a speech at Le Sap, in which he had said that the German soldiers should take reprisals on prisoners of war. (Under cross-examination, however, the witness confessed that the accused used the word " Englishman " not " prisoners," but he claimed that the speech was so worded that it was understood that no prisoners were to be taken, but should be shot.) The witness said that von Buettner, the accused's Adjutant, whom the accused had described as his best officer, had at about Whitsun, 1944, issued a company instruction in which he said, " our company takes no prisoners."

Much of the evidence for the Prosecution fell within the second category and was intended to show that the shooting of prisoners of war alleged in Charge 2 had taken place, and in circumstances which would make Meyer legally responsible for these offences. For the most part, testimony was given by members and ex-members of the Canadian Army, who had themselves been taken prisoners during the action around Authie and the Abbaye Ardenne in the first days of the Allied invasion ; but corroborating evidence was provided by French civilians.

An extract from the evidence given at the SHAEF Court of Enquiry by Major Learmont, whose company had been in the vanguard of the fighting, indicated that he and a group of other prisoners had been lined against a wall at Buron, and covered by machine guns. It seemed clear that they were to be shot. A German soldier, whom the Major took to be an N.C.O., appeared and from his actions seemed to prevent the shootings from taking place. Similar stories of such interventions by individual Germans were told by two other witnesses. Major Learmont, however, also saw a fellow prisoner shot because he had been wounded and could not march. The witness was able to state that the particular group of prisoners of which he formed a part were, from the time of their arrival at the Abbaye Ardenne, escorted by Feldgendarmerie of the 12th S.S. Division.

The evidence which Lt.-Col. Petch, who had commanded the North Nova Scotia Highlanders in the fighting, had given the SHAEF Court of Enquiry, in which he described the military situation around Authie on 7th June, included a statement that the enemy personnel in the area had included elements of two infantry regiments belonging to the static defences

of the area. Furthermore, a prisoner of the 21st S.S. Panzer Division had been captured near Buron on that day.

As part of the evidence of the shootings at Meyer's headquarters, alleged in Charges 3–5, the testimony of a French national named M. Vico, of various members of Canadian and British Concentration Units and of a Canadian Army Pathologist showed that eighteen bodies of Canadian soldiers had been disinterred from concealed graves in the garden of the Abbaye and had been identified by the discs which they wore. All bore fatal head wounds ; eight had evidently been shot while the others appeared to have been killed with a blunt instrument.

Evidence was brought to show that these prisoners were missing from their unit on 7th June, and that several of them had been interrogated at the Abbaye headquarters on that day. It was shown that at the relevant times, the accused had been at the Abbaye, and that it had been his Regimental Headquarters.

Cpl. Macleod of the Canadian Army (along with three other witnesses) stated that, when the pay books which had been taken away from certain of the prisoners at the Abbaye were later returned, they were not all distributed, because some of the prisoners were no longer present to claim them.

The evidence falling within the fourth category was given by Jan Jesionek, who said that, at the Abbaye on 8th June, 1944, he had seen a guard announce to the accused that seven Canadian prisoners had been taken. Whereupon Meyer had said, " what should we do with these prisoners ; they only eat our rations." (The witness later confessed under cross-examination that he could not remember the accused's exact words, but their meaning was, " what can we do with these men ; their only purpose is to eat our rations.") The accused had then said, for all those present to hear, " In future no more prisoners are to be taken." After that the prisoners had been conducted into a park attached to the Abbaye and as each one went into the park the witness heard a shot. He could only assume that Meyer had given orders that they should be shot. Jesionek had then entered the park and had seen seven Canadian dead bodies. He and several other German soldiers had stood in a big semi-circle around the bodies, because the spot where the bodies lay was full of blood.

5. THE EVIDENCE FOR THE DEFENCE

The accused, giving evidence on oath, denied ever saying that his unit took or would take no prisoners, and emphasised that during the entire Normandy Campaign he gave no orders to shoot prisoners. Describing the speech which he had delivered to the 15th Company at Le Sap, he said that Jesionek's statement that he had instructed the soldiers to take reprisals against prisoners of war was untrue. He also denied knowing, on 7th June, that any Canadian prisoners were shot at the Abbaye, and claimed that on the morning of the 10th June, two officers had reported that a number of dead Canadians had been found lying in a garden inside the headquarters. They had the impression that the Canadians had been shot. He went to the garden and when he found that their report was true he had been incensed.

He gave instructions to his Adjutant to find out who had done the deed, and ordered that the Canadians should be buried.

In surveying the operations of 7th June, he mentioned that, in a village near the Abbaye Ardenne called Cussy, he had found the Commander of the Grenadier Regiment of the 21st Panzer Division, who had his headquarters there. The accused also stated that there had been Feldgendarmerie at his headquarters at the Abbaye Ardenne.

The second witness for the Defence, an officer of the 12th S.S. Panzer Division, said that during training and during the first days of the invasion an instruction had been circulated that all prisoners should be sent " back to Division " as quickly as possible, except those taken by Reconnaissance missions, who had permission to question them. He had heard no reports that the accused had said that his unit took no prisoners. The witness stated that during July 1944, the accused had ordered that 150 prisoners should be sheltered in the buildings of his own headquarters because of the bad weather. He had never heard of prisoners being shot at the Abbaye at any time.

When asked whether there were other troops north-west of Caen on the 7th of June, besides the 12th Panzer Division, he replied that Caen itself was in the billeting area of the 21st Panzer Division, that a battle group of the latter Division had been put into action north-west of Caen on the 6th, and that other units in the area had comprised Coastal Defence personnel, Air Force Units and a heavy anti-tank battalion.

In connection with the disposition of troops in the Caen area, the third witness for the Defence, the Regimental Commander of the 21st S.S. Panzer Regiment, said that the headquarters of that Division and of the 716th Coastal Division were situated in a quarry north-west of Caen on the 8th June. In the same area on the same day he could remember parts of the 202 Anti-tank Battalion of the 21st Panzer Division and some Air Force personnel.

A further Defence witness, an Adjutant of the 12th S.S. Panzer Division, said that he had received orders three or four days after the beginning of the invasion that prisoners of war should be evacuated " back to Division " as soon as possible.

As witnesses for the character of the accused, the Defence produced his wife, his Senior Commanding General, an ex-officer of Meyer's battalion and a Canadian Captain who had gained a favourable impression of Meyer when a prisoner in his hands.

6. THE EVIDENCE FOR THE REBUTTAL

The Prosecution called several witnesses for the rebuttal. One of these, a youth named Daniel Lachevre, said that in the evening of the 8th June, 1944, he had gone into the garden of the Abbaye with about four friends in order to play games. While he was there he noticed that the Germans had built a shelter, the position of which he indicated. He returned on the 9th and 10th in the evening and apart from the shelter he saw nothing unusual ; in particular, he saw no dead bodies. Under cross-examination the witness said that he was very familiar with the garden and that he would have noticed if anyone had been digging there.

7. THE CASE FOR THE DEFENCE

Counsel for the Defence chose not to make any opening address before calling witnesses, but delivered a closing address.

He began by asking the Court to place little weight on the evidence of the first Prosecution witness, who had not been present for cross-examination by the Defence and questioning by the Court. He submitted that the witness's story, according to which an N.C.O. had read secret orders in the street of a town, no doubt with civilians present, in the absence of any officer on parade, was contrary to common sense and from a military point of view ridiculous. He also doubted whether a witness could possibly have memorised accurately a document which he had once heard read.

Counsel pointed out that Jesionek had said that it had only been understood from Meyer's speech (the exact words of which he could not remember) that reference was actually being made to prisoners. Meyer on the other hand, while his account of his speech was the same as that of Jesionek in so far as it had stressed the need for self-reliance, denied that retaliation against prisoners had been intended. Three Prosecution witnesses, as well as Meyer, had said that there were standing orders that prisoners should be taken ; and exercises on the interrogation of such prisoners had been mentioned.

Counsel's submission was that Meyer never gave any order that prisoners should not be taken and that if any such statement had been made no weight was placed on it by the men in his command. The first charge therefore remained unproved.

Regarding the second charge, Counsel made three submissions for the consideration of the Court. The first was that there were not only 25th Panzer Regiment troops around Buron and Authie on 7th June, 1944, but troops of the 21st Panzer Division, too. Secondly, the Defence claimed that if Canadian prisoners were killed in the area of Authie and Buron on 7th June, 1944, there was no evidence as to the formation to which those responsible belonged. To rebut the presumption that there was a general plan, sponsored by Meyer, to shoot prisoners was the evidence of Major Learment and Sgt. Dudka, who both told of an N.C.O. or officer who had stopped any intended shooting by the guards of Canadians. Other witnesses had described how they had been accorded the normal treatment of prisoners of war. In the third place, there was evidence that Meyer had given shelter of 150 prisoners in his own headquarters. Furthermore, 200 Canadians had been captured on 7th June, 1944. They had survived, although they could not all be needed for interrogation. There could therefore be no general plan for shooting prisoners.

Counsel concluded his treatment of the second charge by submitting that once a Brigade Commander had sent his men to the attack he had no control over their individual actions.

Turning to the third and fourth charges, Counsel spent some time in attempting to discredit Jesionek's evidence by contrasting his statements in court on a number of details not connected or only indirectly connected with the alleged offences with his words spoken during his interrogations

by a war crimes investigating team, and with the evidence of other witnesses on the same subjects. With more particular reference to the alleged shootings, Counsel claimed that Jesionek's story conflicted with the evidence of Lachevre. Counsel asked how the garden at the Abbaye could be completely undisturbed and unmarked if graves had recently been dug and if there had been a large pool of blood where the bodies had been ? Finally, as there was no evidence as to who shot the seven Canadians, even as to their regiment, Counsel submitted that the Court could not rightly find anyone guilty of the act.

With regard to the fifth charge, Counsel pointed out that there was considerable evidence that the German military police had had charge of the prisoners in question, and submitted that any suspicion should be directed in their direction. He expressed the opinion that, had any person in authority ordered the shootings, it was unlikely in the first place that the pay books of the victims would have been openly produced later, instead of being destroyed, and in the second place that marks of identification would have been left on the bodies.

8. THE PROSECUTOR'S CLOSING ADDRESS

Dealing in the course of his closing remarks with the first charge, Counsel for the Prosecution asked whether it was likely that a Company Sergeant Major would have undertaken to read orders of the kind alleged, unless he had a superior order to do so. He maintained further that this officer had adopted the only possible means of conveying secret orders to his troops, when he gathered them together in tight formation and conveyed to them orally the contents of the written instructions which he held in his hand. Counsel pointed out the wealth of evidence which must be weighed against the word of the accused that he had given no orders that prisoners were to be shot. As proof of the accuracy of Jesionek's words, Counsel asked the Court to compare the bulk of his account of Meyer's speech at Le Sap with that of the accused himself.

If the Court still had any doubt as to the first charge, Counsel asked them to consider the evidence as to the actual shootings and to ask themselves whether these could have happened without incitement or counsel. Furthermore, there was practically no evidence that they had resulted in the punishment of the offenders.

Whether the accused were found guilty on either the third or the fourth charge would depend almost exclusively on the weight placed by the Court on his evidence and on that of Jesionek. The latter was a Pole who had deserted from the German Army ; his father had been imprisoned by the S.S. for a period. Nevertheless, there was no reason why he should act out of spite against Meyer personally. His evidence had not been shaken in any material respect by cross-examination. Taking it as firmly established that the shooting did occur, the only explanation would be that someone at the headquarters, with Meyer's knowledge or approval, carried it out, within a hundred metres of his command post, in broad daylight, and at a time when he could have been and probably was there. This presupposed either that the persons committing the deed felt secure in the

knowledge that the Regimental Commander had ordered the shooting or had approved it, or that the perpetrators had no fear of disciplinary consequences if they should be found out. The Court had heard of the accused's reputation as a strict disciplinarian.

By contrast with Jesionek's account, which he characterised as honest and convincing, Counsel drew attention to the fact that Meyer, in previous examinations, had denied all knowledge of the shootings, even after being informed of the evidence obtained from Jesionek. On being told that he was to be tried he had subsequently made a statement, which Counsel regarded as untrue, admitting that he knew of the shooting of eighteen prisoners, and saying that it was reported to him on 10th or 11th June. Despite the recent nature of the shootings, he had told the Court that he had not been able to find the perpetrators. Was it probable, asked Counsel, that the bodies were left for several days with civilians in the vicinity ? Would they have been buried in five separate graves had they all been shot at the same time ? Furthermore, Mm. Vico and Lachevre had shown that no bodies were there on the evenings of the 8th, 9th, or 10th June, or on the 11th. Again, the shelter which had been constructed by the Germans was in such a position as to make it improbable that the accused had entered the garden by the way he had described, or seen the bodies from the position which he had indicated while in the witness box.

While he would not claim that there definitely were no other troops in the neighbourhood, Counsel maintained that there was no positive evidence that the prisoners were killed by troops other than the Meyer's Regiment. Though most of the troops involved in the killings were wearing camouflage uniform, he claimed that they were all under Meyer's command. He pointed out that the offer of leave to soldiers who took prisoners only came later, when the flow of prisoners had diminished.

Even if the shootings alleged in the fifth charge were committed by the Military Police serving at Meyer's headquarters, the former, were clearly under the latter's disciplinary control.

Regarding the question of the handing back of the prisoners' pay books, Counsel for the Prosecution thought that the Defence was expecting a little too much efficiency in suggesting that any person in authority would have destroyed those of the shot prisoners.

9. SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate pointed out that the killing of prisoners was a war crime, not only under international custom and usage, but also under the Hague Convention No. IV of 1907 and the Geneva Prisoners of War Convention of 1929.

If an officer, though not a participant inor present at the commission of a war crime incited, counselled, instigated or procured the commission of a war crime, and *a fortiori*, if he ordered its commission, he might be punished as a war criminal. The first and third charges fell within this category of offences. In the second, fourth and fifth charges, however, Meyer was alleged to have been " responsible for " the crimes set out therein. In this connection,

the Judge Advocate pointed out that Regulations 10 (3) (4) and (5) of the War Crimes Regulations (Canada) stated that when certain evidence was adduced, that evidence might be received by the Court as *prima facie* evidence of responsibility. By virtue of these Regulations, it was unnecessary, as far as the second, fourth and fifth charges were concerned, for the Prosecution to establish by evidence that the accused ordered the commission of a war crime, or verbally or tacitly acquiesced in its commission, or knowingly failed to prevent its commission. The facts proved by the Prosecution must, however, be such as to establish the responsibility of the accused for the crime in question or to justify the Court in inferring such responsibility. The secondary onus, the burden of adducing evidence to show that he was not in fact responsible for any particular war crime then shifted to the accused. All the facts and circumstances must then be considered to determine whether the accused was in fact responsible for the killing of prisoners referred to in the various charges. The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing of prisoners, were matters affecting the question of the accused's responsibility.

Dealing with the third charge, the Judge Advocate said: " There is no evidence that anyone heard any particular words uttered by the accused which would constitute an order, but it is not essential that such evidence be adduced. The giving of the order may be proved circumstantially; that is to say, you may consider the facts you find to be proved bearing upon the question whether the alleged order was given, and if you find that the only reasonable inference is that an order that the prisoners be killed was given by the accused at the time and place alleged, and that the prisoners were killed as a result of that order, you may properly find the accused guilty of the third charge." He drew attention, however, to paragraph 42 of Chapter VI of the *Manual of Military Law* regarding circumstantial evidence, which states: ". . . before the Court finds an accused person guilty on circumstantial evidence, it must be satisfied not only that the circumstances are consistent with the accused having committed the act" (that is, said the Judge Advocate, that he gave the order) " but that they are inconsistent with any other rational conclusion than that the accused was the guilty person."

In connection with the fourth charge, he pointed out that Regulation 10 (5) provided that if the accused or an officer or N.C.O. of his regiment was present when members of his regiment shot the seven prisoners then the Court might accept that fact as *prima facie* evidence of the accused's responsibility for that crime.

10. THE VERDICT

Meyer was found guilty of the first, fourth and fifth charges, and not guilty of the second and third.

11. THE SENTENCE

Meyer was sentenced to death by shooting.

The Convening Authority, however, commuted the death sentence to one of life imprisonment, on the grounds that Meyer's degree of responsibility did not warrant the extreme penalty.

B. NOTES ON THE CASE

1. THE JURISDICTION OF THE COURT

The jurisdiction of the Court was based on the War Crimes Regulations (Canada), P.C. 5831.[1]

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Offence Alleged*

It is a well-established rule of customary International Law that unarmed prisoners of war are not to be shot or deliberately harmed, and this provision has received recognition in various international conventions, which were referred to by the Prosecutor in his opening address. It may be useful to examine the provisions which he mentioned.

Articles 23 (*c*) and (*d*) of the Hague Convention of 1907 concerning the Laws and Customs of War on Land run as follows :

> " Article 23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden—
>
> (*c*) To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion ;
> (*d*) To declare that no quarter will be given."

Article 2 of the Geneva Prisoners of War Convention of 1929 provides that :

> " Prisoners of war are in the power of the hostile government, but not of the individuals or formation which captured them.
>
> They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.
>
> Measures of reprisal against them are forbidden."

Article 5 forbids the ill-treatment of prisoners of war who refuse to give information regarding the situation of their armed forces or their country.

Articles 1 and 2 of the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field lay down that :

> " Article 1. Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances ; they shall be treated with humanity and cared for medically without distinction of nationality, by the belligerent in whose power they may be."

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(1) See p. 125.

Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment.

Article 2. Except as regards the treatment to be provided for them in virtue of the preceding article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of International Law concerning prisoners of war shall be applicable to them.

Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they may think fit beyond the limits of the existing obligations."

Amendment No. 12 (1929) to the *Manual of Military Law*, to which the Prosecution referred, is a re-drafting of Chapter XIV (The Laws and Usages of War on Land) of the *Manual*, made in the light, *inter alia*, of the Geneva Conventions of 1929. It is intended as a guide for the use of the military forces. It has not therefore the authority as a statement of International Law which attaches to an international treaty.

Such publications, prepared for the benefit of the armed forces of various nations, are frequently used in argument in the same way as other interpretations of International Law, and, *in so far as their provisions are acted upon*, they mould state practice, which is itself a source of International Law.

(ii) *The Application of Paragraphs* (3), (4) *and* (5) *of No.* 10 *of the War Crimes Regulations* (*Canada*)[1]

The view of the Judge Advocate in the case on these provisions have already been recorded. It would not be out of place, however, to set out the remarks of Counsel on these interesting paragraphs. In his opening address, Prosecuting Counsel said that the vicarious responsibility of a high-ranking officer for atrocities committed by troops under his command, in the absence of a direct order was based, " firstly, on a known course of conduct and expressed attitude of mind on the part of the accused ; secondly, upon his failure to exercise that measure of disciplinary control over his officers and men which it is the duty of officers commanding troops to exercise ; and, thirdly, on a rule of evidence applicable in these cases, which in effect says that, upon proof of certain facts, the accused may be convicted, if he does not offer an explanation to the court sufficient to raise in their minds a reasonable doubt of his guilt."

Paragraphs (4) and (5) were important to the present case because evidence would be submitted to show that the accused was *prima facie* guilty for war crimes under both provisions, quite apart from positive evidence of guilt. The Prosecution would produce evidence to show, in Charges 1, 3 and 4, that an officer or N.C.O. or both were present at the time when these offences were committed, and that this was probably also the case with respect to Charges 2 and 5. Furthermore, the offences proved would be such as to constitute " more than one war crime " within the meaning of

(1) See pp. 128-9.

paragraph (4). Discussing further the presumptions laid down in paragraphs (3), (4) and (5), Counsel expressed the opinion that: " Technically it could be said that an Army Commander might be held responsible for the unlawful acts of a private soldier hundreds of miles away, simply because an N.C.O. happens to be present at the time the offence was committed. . . . It is only pedantic nonsense to suggest that any such meaning is intended. A reasonable line must be drawn in each case, depending on its circumstances. The effect of the provision is simply, that upon proof of the facts there set out, the burden shifts to the accused to make an explanation or answer, and the court may convict but is not obliged to do so, in the absence of such explanation or answer. The section does not say that the court must receive such evidence as *prima facie* evidence of responsibility, but merely that it may."

Counsel for the Defence did not touch upon the provisions in question.

During the trial proceedings, a discussion arose as to the extent to which evidence not directly connected with the offences alleged on the Charge Sheet could be rendered admissible by Regulation 10 (4). The Prosecution proposed to produce evidence of an atrocity committed at the Regimental Headquarters at Abbaye Ardenne on or about the 17th June, 1944. The Defence objected that the charges contained in the first Charge Sheet made no mention of events alleged to have been committed at such a date. The Prosecution replied that this piece of evidence was made admissible by Regulation 10 (4), since it constituted evidence which " could be adduced before the Court to show that his formation, while under his command, committed a series of offences in order to establish a *prima facie* case of his responsibility for the offences with which he is charged." There was no question of the accused being specifically charged with the commission of the offence referred to.

The decision of the Court was that, provided the Prosecution could establish the fact that the accused was the responsible commander at the time when this incident was alleged to have occurred, it was prepared to listen to this evidence.

The question then arose as to whether the accused had not been promoted to Divisional Commander at the time of the alleged offence and whether the evidence was not therefore rendered inadmissible. The opinion of the Defence was that if Meyer was in command of the division at the time when the offence occurred, the matter fell right outside the first Charge Sheet, wherein he was accused of crimes committed as commander of the 25th Panzer Grenadier Regiment. The second Charge Sheet had been kept separate from the first by reason of that fact. The Prosecution replied that, if the Court considered that the accused was not Regimental Commander at the time, then the Prosecution would submit that the evidence was nevertheless admissible. A witness was then produced who stated that Meyer was promoted to Commander of the 12th S.S. Panzer Division at about noon on 17th June. A second witness could only state that the promotion took place about ten days after the beginning of the invasion (which, according to the examining Counsel, could mean either 16th or 17th June). The Prosecution then stated that the evidence which they wished to produce related in fact to two incidents, one in the early morning of the

17th and the other on the late afternoon thereof. Whereupon the President of the Court ruled that the evidence was admissible.

From the fact that Meyer was found guilty on the fourth and fifth charges but not on the third, it seems clear that the Court made an express application of the presumptions contained in Regulation 10, and considered that it was justifiable thereupon to pass the death sentence on the accused. The Convening Authority, however, was of the opinion that " Meyer's degree of responsibility was not such as to warrant the extreme penalty."

CASE NO. 23

TRIAL OF MAJOR KARL RAUER AND SIX OTHERS

BRITISH MILITARY COURT, WUPPERTAL, GERMANY,
18TH FEBRUARY, 1946

A. OUTLINE OF THE PROCEEDINGS

Karl Rauer (formerly Major), Wilhelm Scharschmidt (formerly Hauptmann), Otto Bopf (formerly Army Major), Bruno Bottcher (formerly Hauptmann), Hermann Lommes (formerly Oberfeldwebel), Ludwig Lang (formerly Feldwebel), Emil Gunther (formerly Unteroffizier), formerly attached to the aerodrome at Dreierwalde, Germany, were charged with committing war crimes in that they were " concerned in " the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on 22nd,(1) 24th and 25th March, 1945, respectively. The Prosecution argued that the accused had thereby violated Article 23 (*c*) of the Hague Convention No. IV of 1907.

It was shown that on 21st March the aerodrome was heavily bombed and five Allied airmen were captured by the Germans. Rauer, the commandant of the camp, claimed that he issued no specific orders regarding these prisoners, but expected that they would be sent to a prisoner-of-war camp in the usual way. Scharschmidt, his Adjutant, after questioning them, detailed Oberfeldwebel Karl Amberger to lead the escort, despite the warnings of Chief Clerk Lauter that Amberger was unsuitable for the task in view of his open hostility to Allied prisoners of war ; the Adjutant did make some attempt to find a substitute. On the night of the 22nd four of the party of prisoners were shot dead on the way to the station.

Rauer admitted that he was primarily responsible for prisoners of war, but added that the administration of questions relating to them was a matter for Scharschmidt, the Adjutant. Both he and Scharschmidt accepted a report that the prisoners had been shot while trying to escape(2) and Rauer passed this report on to higher authority. Rauer pleaded that he had no time to make a personal investigation, and Scharschmidt pleaded that he had no orders to do so.

On 24th March, a further party of prisoners, captured after a second serious air raid, were sent at night to help in filling in bomb-holes on the runways of the aerodrome. This was done under Rauer's orders, transmitted through Scharschmidt, though there was some evidence that the

(1) The first offence was that which led to the sentence of death passed on former Oberfeldwebel Amberger (See Vol. I of this series, pp. 81-87).

(2) The fifth, whose affidavit alleging that the four had been shot in cold blood appeared as evidence both in this trial and in the trial of Amberger, escaped though wounded.

immediate order came from Bopf. In court, Gunther claimed that Lang had told him that Bopf had ordered the shooting of the prisoners. The latter were taken out by Gunther, Lommes, Lang (all of whom came under Bopf's orders) and one other, not before the Court. Seven or eight prisoners were shot, and there was evidence implicating Gunther, Lommes and Lang in the shooting. Bottcher, who was in charge of repairs, claimed to have reported the matter to Scharschmidt, but the latter denied this. Lommes claimed that Scharschmidt said to the N.C.O.s involved: " You must make a report that they were shot whilst trying to escape, so that I can pass it on." Lang told Bopf that the shooting had been committed, but Bopf took no action and jumped to the conclusion that Scharschmidt must have ordered it. Bottcher was also inactive, and Scharschmidt took no action because Rauer had intended to interrogate the escort. The commandant, however, could not find the time to do so. An unchecked report stating that the prisoners had been shot while trying to escape was thereupon sent to higher command. Lommes claimed in court that Bottcher said that the killing was justified in view of the German deaths caused by bombing.

Finally, on 25th March, a wounded prisoner was taken out of the aerodrome in a motor cycle side-car by Lang and Lommes and shot by Lang. Rauer and Scharschmidt stated in court that they knew nothing of this incident until long afterwards. Bottcher admitted lending his motor cycle to Lommes, and claimed that he had the impression that the victim was being taken to hospital. Lommes claimed that both Bottcher and Bopf had said that the remaining prisoner must disappear like the others ; the two officers denied this.

There was evidence that both Rauer and Scharschmidt expressed hostile opinions towards captured enemy air crews, in the presence of N.C.O.s. Rauer, however, denied issuing any orders for the shooting of prisoners of war, and explained that he was prevented from making personal investigations into the shootings by his other duties ; the Allied armies were near, air-raids were severe and necessitated extensive repairs by hundreds of prisoners of war, internees and civilians, which he had to supervise, and his task was made worse by ill-feeling among the officers on the aerodrome. No witness claimed that the killings were carried out on the specific orders of either Rauer or Scharschmidt.

Subject to confirmation by higher military authority, the following findings were pronounced.

Rauer and Scharschmidt were found not guilty of the first charge, which concerned the events of 22nd March, but guilty of the other two charges.

The remaining accused except Gunther, were found guilty of the second and third charges, not having been accused of the first charge. Gunther was found guilty of the second charge, concerning the events of 24th March, there being no other charge against him.

All of the accused were sentenced to death by being hanged. The sentence on Rauer was commuted to one of life imprisonment by higher military authority, and the other sentences confirmed.

B. THE MEANING OF THE CHARGE OF BEING " CONCERNED IN " A KILLING

The names of two of the accused, ex-Major Rauer and ex-Haupmann Wilhelm Scharschmidt, the commandant of the aerodrome and his adjutant, appeared on all three charges, these accused being thereby charged with being " concerned in the killing " of twelve Allied prisoners of war on three different dates in March 1945. It was agreed that there was no direct proof that either had given any specific orders for the offences to be committed. Yet both were found guilty on the second and third charges, and sentenced to death by hanging. They were found not guilty on the first charge, and the sentence on Rauer was commuted by higher military authority to one of life imprisonment.

Counsel for Rauer submitted that this accused " must be proved to have been a party to a crime or to have acted in consort with others in committing that crime or to have been guilty of criminal negligence of the highest order or to have been an accessory after the killings." He could not be convicted merely because he was the commander of people who were responsible for killings. In his closing address, Counsel claimed that Rauer should not be convicted of being concerned in a crime merely because he was the commander of the responsible parties. He must be proved to have participated in the crime, either by issuing orders in connection with the killing or by allowing the perpetrators to believe that they could kill airmen with impunity. Above all it must be proved that the accused Rauer had the necessary *mens rea* or guilty mind.

In his closing speech, Counsel for Scharschmidt submitted that utterances by the latter hostile to British pilots, made after heavy air raids, were not sufficient to prove him guilty of possessing that guilty mind which was an essential ingredient of the charges. Counsel's submission regarding the first charge was that there was no evidence that Scharschmidt instigated this crime or, realising that a crime had been committed, condoned it. If the Court considered that he was negligent in any of his duties, Counsel submitted that negligence was not enough on this charge. As to the charges as a whole he claimed that there was no evidence that Scharschmidt instigated any killing or condoned any killing. In every case he made an immediate report to his commandant, who must bear the responsibility for any neglect of duty that occurred. It was never Scharschmidt's duty to carry out any interrogations himself.

In closing his case, the Prosecutor pointed out that a man is deemed to intend the natural consequences of his acts. He contended that the murder in these charges came about if not on direct orders then because the Kommandatur in the form of Rauer and Scharschmidt let their hostile views towards prisoners of war be known to their subordinates, who thereupon took action against the prisoners. He considered that the offence of incitement to murder came properly within the scope of the words, " were concerned in the killing." In Section 4 of the Offences Against the Person Act (1861), incitement was defined as to solicit, encourage, persuade, endeavour to persuade, or propose to any person to murder any other person. The Court might well think that this wording included in its

scope exactly a situation where there existed a chain of command. If the Court were not satisfied that the evidence of the activities of any of the officers was enough to show that he was an accessory before the fact, then it was submitted there was evidence on which the Court might find that the accused officers were guilty of inciting to murder.

Scharschmidt, continued the Prosecutor, could have delayed sending the prisoners until a more reliable escort became available. After the killings, untested reports were accepted by Rauer or Scharschmidt from the escorts, to the effect that the prisoners were shot while trying to escape, and were automatically forwarded to higher command. Was it not strange that the prisoners involved in the second incident were not sent out by Rauer to mend the runways till midnight, whereas the work had been begun at 8 o'clock, and that Rauer claimed not to know that his action was wrong ? Rauer ought to have anticipated further trouble in view of the deaths on the 22nd.

Summing up on a submission on behalf of Rauer of no case to answer, the Judge Advocate said : " In my view the charge does not envisage anything in the nature of negligence. The words : ' When concerned in the killing ', to my mind, are a complete and direct allegation that Rauer was either instigating murder or condoning it. In my view that is the real basis of the charge which is before you, and I do not propose to embark upon any questions as to whether Rauer was negligent either at the time or afterwards in not making a proper investigation."

The Judge Advocate in his final summing up, dealing with the first charge, said that there seemed no direct evidence that Karl Rauer or Scharschmidt deliberately gave orders to Amberger and his companions to shoot the captives. Neither did he see any direct evidence upon which the Court could properly arrive at a finding that, though they were not giving direct orders they were passing on to these N.C.O.s the impression that the killing was what they wanted to happen, and that if the latter killed the prisoners nothing would be said about it and they would not be punished. He reminded the Court, however, that the Prosecution maintained that none of the killings alleged in the three charges could have occurred on the aerodrome without the connivance, without the direction and without the complicity of the Commanding Officer and the Adjutant of the station, and that as a corollary to the reliance which was placed on superior orders in trials of German war criminals the Prosecution was claiming that no German N.C.O.s would dare to take prisoners' lives unless they were satisfied that they had been told that such action would be approved by the Commanding Officer.

The Judge Advocate felt that the Court would be prepared to say without question that it was probably a sound view to take, in regard to the German Army, that the persons who did the killings did not commit these crimes without having some orders from their superiors, but the question was who did give these orders, who were the superiors involved ? Apart from Rauer and Scharschmidt, Bottcher and Bopf were also officers. The finding of the Court was that all four officers were guilty of being concerned in the killing of the prisoners on the aerodrome and of the wounded prisoner.

The decision of the Court to find Rauer and Scharschmidt not guilty of the first charge, concerning the shootings on the way to the station, may have been influenced by the consideration, which was pointed out in the trial, that it was less reasonable for these officers to believe after the second incident that the prisoners involved were shot while trying to escape than it was after the first, and that measures should have been taken after the first shootings to prevent a repetition.

CASE NO. 24

TRIAL OF KURT STUDENT

BRITISH MILITARY COURT, LUNEBERG, GERMANY,
6TH–10TH MAY, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused was faced with eight charges alleging war crimes committed by him in the kingdom of Greece (according to the last three charges, on the Island of Crete itself) as Commander-in-Chief of the German forces in Crete, at various times during May and June 1941. The charges alleged respectively that he was " responsible for," first, the use on or about 22nd May of British prisoners of war as a screen for the advance of German troops, when, near Maleme on the Island of Crete, troops under his command drove a party of British prisoners of war before them, resulting in at least six of these British prisoners of war being killed by the fire of other British troops ; secondly, the employment in May of British prisoners of war on prohibited work, when, at Maleme aerodrome on the Island of Crete, troops under his command compelled British prisoners of war to unload arms, ammunition and warlike stores from German aircraft ; thirdly, the killing on or about 23rd May of British prisoners of war, when, at Maleme aerodrome on the Island of Crete, troops under his command shot and killed several British prisoners of war for refusing to do prohibited work ; fourthly, the bombing on or about 24th May of No. 7 General Hospital when, near Galatos on the Island of Crete, aircraft under his command bombed a hospital which was marked with a Red Cross ; fifthly, the use on or about 24th May of British prisoners of war as a screen for the advance of German troops, when, near Galatos on the Island of Crete, troops under his command drove a party of British prisoners of war before them (these British prisoners of war being the staff and patients of No. 7 General Hospital), resulting in a named Staff Sergeant of the Royal Army Medical Corps and other British prisoners of war being killed by the fire of British troops ; sixthly, the killing on or about 27th May of British prisoners of war, when, near Galatos, troops under his command killed three soldiers of the Welch Regiment who had surrendered to them ; seventhly, the killing on or about 27th May of a British prisoner of war, when, near Galatos, troops under his command wilfully exposed British prisoners of war to the fire of British troops, resulting in the death of a named Private of the Welch Regiment ; and finally, the killing in June of British prisoners of war, when, at a prison camp near Maleme, troops under his command shot and killed several British prisoners of war. He pleaded not guilty to all the charges.

The offences alleged all took place in connection with an attack by German parachutists on the Island of Crete under the direction of the accused. The latter, then General Student, was shown to have been at his base in Greece until the morning of 25th May, 1941, and to have been in Crete from that time until the end of June 1941. Air support was in the control of General von Richthoven, Commander of the 8th Air Corps, though a certain degree of co-operation between the two generals was shown to have existed.

The evidence on the first charge was that of an R.A.F. Sergeant who testified that, on 20th May, 1941, he was among a number of British personnel who were captured by German parachutists in Crete and forced to advance up a hill towards lines held by New Zealand troops ; when the latter shot at the prisoners, the Germans following behind returned fire. The witness was certain that at least two prisoners were killed and thirteen others fell to the ground.

The same witness also gave evidence relevant to the second and third charges. He described how he and other prisoners were forced, on the 21st May, to repair shell damage on Maleme aerodrome, which was captured by the Germans and under continuous fire. They were shot at if they tried to stop work ; though no one was killed or wounded, he was beaten when, due to a wound, he did not work fast enough. When ordered to unload guns, shells, cases and stores from landed aircraft, the prisoners refused to do so. Whereupon the officer in charge marched three aside and had them shot in the sight of the others. A second R.A.F. Sergeant also told how, on 22nd May, he and others were forced at the point of a gun to repair the Maleme aerodrome and to unload food and arms from German aircraft under fire from British artillery and subject to bombing. Both witnesses added that the prisoners were not allowed to take cover.

A former Sergeant in the R.A.M.C. provided evidence relative to the fourth and fifth charges. He described a bombing on 18th May, and a bombing and machine-gunning on 20th May, of the hospital, which occupied a promontory on the coast and was clearly marked with a Red Cross. After the capture on the same day of the hospital, the staff and the wounded were marched towards their own lines in the Galatos area. The witness concluded that they were intended as a shield for the German troops. A Staff Sergeant and some others were killed by fire from the New Zealanders.

Three affidavits were put in in which members of the Imperial forces who had since returned to Canada and New Zealand, stated that the date on which the hospital was bombed was 25th May.

Evidence relating to the sixth and seventh charges were given by two former members of the Welch Regiment. They described how on 27th May, 1941, three men of their section were shot by the Germans after capture and the Private named in the seventh charge was made to stand on the skyline so that he was killed by fire from his own lines.

The only direct evidence on the eighth charge was that of the first-mentioned witness, but it was not clear whether the alleged shootings took place before 30th June, 1941, when the accused gave up his command in Crete.

The accused claimed that he knew nothing of the bombing of the hospital and that if any atrocities occurred in the field they were without his consent or knowledge and against his wishes. In a pre-trial statement he expressed the opinion that: " The question of temporarily detailing prisoners to work in the fighting zone must in my opinion be judged separately. It can never be avoided in airborne operations, as Arnhem has shown." When he went into the witness box he distinguished between unloading medical

supplies and food and unloading arms and ammunition, and said that he thought it perfectly possible that prisoners did unload one plane as it came in containing medical supplies and were then withdrawn when another came in with arms and ammunition.

A former Major attached to the accused's Staff said that the reconnaissance photograph of the area of the hospital showed a tented camp but no Red Cross markings. Two other German officers stated that no one in the accused's headquarters realised that the camp was a hospital. One of these two witnesses, the accused's former Chief of Staff, said that Student's superior, General Lohr, had ordered the accused to allow General Ringl, the commander in the western part of the Island (which included Maleme), a free hand, and that Lohr had also said that requests for targets to be bombed should be made directly by General Ringl to General von Richthoven Orders had gone out, added the witness, that as many prisoners as possible should be taken and sent back for interrogation.

A Brigadier in the New Zealand Expeditionary Force, who had been very near the hospital at the time of its bombing, came forward to give evidence for the Defence. He stated that on the 18th or 19th May, 1941, one bomb fell inside the hospital area, but that it seemed clear that the attack was intended for a large crowd of troops who were bathing in the sea. The witness stated that the invasion of Crete began on 20th May, and pointed out that after 10 a.m. on that date the tented area ceased to be a hospital, the staff and patients having been driven out by the Germans themselves. He did not think that these prisoners had been used as a screen, because no attack was actually launched behind them. The position was very fluid at the time, men of his own brigade were hunting parachutists and there were many isolated battles in progress. The prisoners taken from the hospital were later retaken by the Imperial troops, but were not put back there because the whole area of the hospital had become a battleground. The witness observed that the red cross must have been visible on any reasonable photograph taken of the hospital from the air. His general opinion, however, was that the German troops had maintained good conduct, and that the red cross had subsequently been respected.

The accused was found not guilty of the first, fourth, fifth, seventh and eighth charges but guilty of the second, third and sixth.

Subject to confirmation by superior military authority, he was sentenced to imprisonment for five years. The finding and sentence were not, however, confirmed.

B. NOTES ON THE CASE

1. THE NATURE OF THE OFFENCES ALLEGED

All of the acts alleged by the eight charges to have taken place were clear breaches of International Law. Even though the precise provisions violated were never specifically quoted, it is not without interest to set out some relevant Articles of the Geneva Prisoners of War Convention of 1929 and Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.

The former Convention provides :

" Article 2. Prisoners of war are in the power of the hostile government, but not of the individuals or formation which captured them.

They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.

Measures of reprisal against them are forbidden.

" Article 7. As soon as possible after their capture, prisoners of war shall be evacuated to depôts sufficiently removed from the fighting zone for them to be out of danger.

Only prisoners who, by reason of their wounds or maladies, would run greater risks by being evacuated than by remaining may be kept temporarily in a dangerous zone.

Prisoners shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone. . . .

" Article 27. Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and their ability. . . .

Non-commissioned officers who are prisoners of war may be compelled to undertake only supervisory work, unless they expressly request remunerative occupation. . . .

" Article 31. Work done by prisoners of war shall have no direct connexion with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units. . . .

" Article 32. It is forbidden to employ prisoners of war on unhealthy or dangerous work. . . ."

The Convention on the sick and wounded provides :

" Article 6. Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents.

" Article 9. The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, and chaplains attached to armies, shall be respected and protected under all circumstances. . . .

" Article 19. As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armed forces. . . .

" Article 20. The emblem shall figure on the flags, armlets, and on all material belonging to the medical service, with the permission of the competent military authority.

> " Article 22. The distinctive flag of the Convention shall be hoisted only over such medical formations and establishments as are entitled to be respected under the Convention, and with the consent of the military authorities. . . .
>
> Belligerents shall take the necessary steps, so far as military exigencies permit, to make clearly visible to the enemy forces, whether land, air, or sea, the distinctive emblems indicating medical formations and establishments, in order to avoid the possibility of any offensive action."

The accused claimed that the temporary detailing of prisoners to work in the fighting zone was unavoidable in airborne operations. In his summing up, the Judge Advocate made an interesting observation on the question whether parachute troops should occupy the same position as others in relation to the provisions of the International Conventions on the Conduct of Warfare. "Parachutists," he said to the Court, " are not like ordinary soldiers. They have difficult situations to deal with and they often have to work in small numbers. They have to work on their own initiative and it is for you, as soldiers, to say whether the same standard must be adopted by a parachutist when he is dropped in hostile country in small numbers as with the ordinary soldier in the ordinary infantry attack and it is for you to decide whether on this expedition those paratroops would not be told that they would have to be ruthless, that they would have to fight hard and they would have difficult circumstances to get over but their paramount object must be to carry out the plan. Now, gentlemen, I invite you later on to consider how parachutists are trained and how they must be trained for their difficult duties. I am bound to say here that the Defence are saying in the case of this particular formation trained by Student that it was trained most humanely, that they would be clear as to what to do and that they would behave strictly in accordance with the laws and usages of war. I will say no more on that point but it is one, no doubt, which will occur to you and you will have to consider the conduct of the parachute troops in the positions in which they were brought. I think you will take the view that the Defence feels that the Hague Convention and International Agreements are out of date in that they act rather harshly on the parachutist, and they would make them read no doubt so that the parachutist would not come under this International Law which is intended to make fighting less severe for non-combatants and combatants alike." This question had not, however, received any treatment by Counsel.

2. THE PERSONAL RESPONSIBILITY OF THE ACCUSED FOR OFFENCES COMMITTED BY HIS TROOPS

The eight charges brought against the accused alleged not offences committed by him, but offences for which he was responsible. The Prosecutor pointed out in his closing address : " This case falls really into two parts and there are two separate matters which it will be your duty to decide. First whether these events which you have heard sworn to in the witness box or any of them in fact took place and if you decide that they

did take place the second point will arise as to whether this man was responsible for them." Student was not shown to have ordered any of the offences alleged.

The Prosecutor claimed that: " General Student was very keen on the capture of Crete. He had pitted his opinion against the opinion of Hitler and it was up to him to get Crete at all costs and in my submission all these things were done by subordinates with the full knowledge that they would have been supported by their Commander-in-Chief." Defence Counsel, on the other hand, pointed out that: " When a General decides to make a big scale operation on a corps basis he makes his appreciation of the situation and his staff work out the orders regarding details. Any general policy is obviously that General's responsibility but I maintain that the details are not. The orders which have been worked out by his staff are passed on to all commanders at all levels until the small details are arrived at. It is the small tasks such as the attack on a given hill which are planned and carried out by the junior commanders and their troops. Therefore surely is it not the junior commanders who are responsible for any small and isolated incidents happening within their platoons or sections and are not the senior commanders responsible for what happens throughout their command as a whole." The basic principles relating to the extent of the responsibility of a commander for offences committed by his troops, however, were not fully examined in the present case.

Certain facts may nevertheless be set out which were considered of some importance in the case, and which may have been taken into account by the Court and by the Confirming Authority in making their respective decisions.

In the first place, it was recognised as more probable that repeated or widespread offences were performed under the General's orders than isolated offences. Counsel for the Defence observed that all the charges related to acts done in the Maleme/Canea area, whereas actually troops were dropped at four main points, Maleme, Canea, Rhethymnon and Herakleon. In other words, he claimed, only about half of the troops concerned in the invasion were in the Maleme/Canea area. It could not, therefore, be said that it was the general policy of the parachute troops to commit atrocities and to capture Crete at any price. Why, he asked, if the shooting of prisoners of war was General Student's general policy, did not incidents occur at the prison camps at Canea and Skenis similar to those alleged to have happened at the camp near Maleme ?

The Prosecutor claimed that three instances had been proved in which captured troops had been forced by German soldiers to advance ahead of them, either to act as a screen to the latter in their attack or to cause the Imperial troops to reveal their positions by firing on the prisoners in mistake for their enemies. The fact that no less than three instances of such behaviour had been proved gave rise to an inference, in the Prosecution's submission, that an instruction had been given that in certain circumstances such action was correct. He pointed out that General Student had said that he was responsible for the whole of the training of the parachute division.

In his summing up the Judge Advocate set out very clearly what had been the Prosecution's position in the case ; the Prosecution, he said, " are going to say that, when you look at this list of atrocities deposed to by the ordinary decent type of soldier or airman, you will have to draw the inference that it was calculated ; that it was part of the policy and that it would only arise in the well disciplined German forces if those troops and the officers knew that they had been either ordered to do it by their commander or, alternatively, that they had been led to believe that nothing would have been heard about it and it would be condoned and appreciated."

A second important question in connection with the responsibility of the accused was that of his official relationship with General von Richthoven, Commander of the 8th Air Corps. Clearly if the latter was able to act entirely independently of Student, the accused could not be held responsible for the bombing of the aerodrome. Defence Counsel claimed that during a conference between the accused and General von Richthoven, only general outlines for air support were discussed. The Prosecutor, on the other hand, claimed that the hospital could not have been selected as a target without the knowledge of the accused and his staff. The Judge Advocates's opinion was that the Court would " be satisfied that, on any major operation on that island, there would be no bomb dropped without Student knowing why and ensuring that the parachute troops should not be bombed " ; he thought that the Court would accept " that there was, in this German expedition, the closest liaison between the staff of the air force and the staff on the ground." Nevertheless the accused was found not guilty of the fourth charge.

The physical presence of the accused in Crete at the time of the alleged offences, on the other hand, was not regarded by Counsel as important. The Prosecutor submitted that it was " quite immaterial " whether he was in Athens or in Crete " at the time " ; he was supreme commander during the whole operation. The Defence made no particular use of the fact that the accused did not arrive in Crete until 25th May, 1941. The Judge Advocate restricted himself to the observation that: " It is common ground that General Student was not in this area at all before the morning of the 25th May, and therefore anything that he may be responsible for up to that date would have been done from his base in Greece."

ANNEX

CANADIAN LAW CONCERNING TRIALS OF WAR CRIMINALS BY MILITARY COURTS

I. JURISDICTION OF CANADIAN MILITARY COURTS

The jurisdiction of the Canadian Military Courts for the trial of war criminals is based on the Act respecting War Crimes of 31st August, 1946 (10 George VI Chap. 73). This re-enacts the War Crimes Regulations (Canada) which were made by Order in Council on 30th August, 1945, and Section 2 of the Act states that: " This Act shall be deemed to have come into force on the thirtieth day of August, one thousand nine hundred and forty-five, and everything purporting to have been done heretofore pursuant to the said Regulations shall be deemed to have been done pursuant to the authority of this Act." The Act is to continue in force until a day fixed by proclamation of the Governor in Council. The actual Regulations are contained in a Schedule to the Act, and Regulation 3 lays down that: " The custody, trial and punishment of persons charged with or suspected of war crimes shall, on and after the date hereof, be governed by these Regulations."

The Regulations are similar in many respects to those attached to the British Royal Warrant of 14th June, 1945, Army Order 81/45,[1] but also include some features of their own. For instance no equivalents of Regulation 10 (4) and (5) (*see* pp. 128-9) are contained in the British enactment.

II. DEFINITION OF WAR CRIME IN THE REGULATIONS

Regulation 2 (*f*) provides that: " ' War crime ' means a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939."

It follows, therefore, that the jurisdiction of Canadian Military Courts for the trial of alleged war criminals, like that of the British Military Courts, is, as far as the scope of the crimes subject to their jurisdiction is concerned, narrower than the jurisdiction of, *e.g.*, the International Military Tribunal established by the Four-Power Agreement of 8th August, 1945, which, according to Article 6 of its Charter, has jurisdiction not only over violations of the laws and customs of war (Art. 6 (*b*)) but also over what the Charter calls " crimes against peace " and " crimes against humanity " (Art. 6 (*a*) and (*c*)).

III. CONVENING OF A CANADIAN MILITARY COURT

Regulation 4 (1) gives certain Canadian Senior Officers power to convene Military Courts for the trial of alleged war criminals, and to confirm the findings and sentences of such Courts, with the proviso that no military court shall be convened for the trial of any person for a war crime unless the case has been certified by the Judge Advocate General, or a representative of his appointed by him for that purpose, as approved for trial.

(1) See Volume I of this series, pp. 105-110.

According to Regulation 8, the accused is not entitled to object to the President or any member of the Court or the Judge Advocate, or to offer any special plea to the jurisdiction of the Court.

IV. COMPOSITION OF A MILITARY COURT

Regulation 7 provides that a Military Court shall consist of not less than two or more than six officers in addition to the President. . . . If the accused is an officer of the naval, military or air forces of an enemy or ex-enemy power the Convening Officer should, so far as practicable, but shall be under no obligation to do so, appoint or detail as many officers as possible of equal or superior relative rank to the accused. If the accused belongs to the naval, military or air forces of an enemy or ex-enemy power, or if Canadian naval, military or air force personnel are in any way affected by the alleged war crime, the Convening Officer should appoint or detail, if available, at least one naval, military or air force officer as a member of the Court, as the case may be.

V. MIXED INTER-ALLIED MILITARY COURTS

According to Regulation 7 (4), where any war crime appears to affect the interest of any Allied power, including any member of the British Commonwealth of Nations, a Convening Officer may invite one or more officers of the naval, military or air forces of such Allied power to become a member or members of the Military Court convened to try the person or persons charged with having committed the offence or appoint as a member of the Court one or more officers of an Allied force serving under his command, provided that in no case shall the number of such Allied officers on a Military Court comprise more than half the members of the Military Court excluding the President.

In law, such a mixed court remains, of course, a Canadian Military Court.

VI. THE LEGAL MEMBER

Regulation 7 (7) states that the Convening Officer shall normally appoint at least one officer having legal qualifications as President or as a Member of the Court.

VII. THE JUDGE ADVOCATE

If no such legal member is appointed, and in default of a person deputed to act as Judge Advocate by the Judge Advocate General, or any representative of his appointed by him for that purpose, the Convening Officer shall by order appoint a person having legal qualifications to act as Judge Advocate at the trial. The duties of the Judge Advocate, according to Rule 103 of the Rules of Procedure, an Order in Council (S.R. & O. 989/1926 as amended) promulgated under the authority of Section 70 of the Army Act, consist mainly in advising the Court on matters of substantive and procedural law. He must also, unless both he and the Court think it unnecessary, sum up the evidence before the Court deliberates on its findings.

Paragraph (*h*) of Rule 103 lays down that, " In fulfilling his duties the Judge Advocate will be careful to maintain an entirely impartial position." The Judge Advocate has no voting powers. The Members of the Court are judges of law and fact, and consequently the Judge Advocate's advice need not be accepted by them, though in practice it carries very great weight.

VIII. RULES OF PROCEDURE AND RULES OF EVIDENCE

Regulation 5 states that, except as provided otherwise in the Regulations either expressly or by implication, the provisions of the Army Act and the Rules of Procedure, so far as they relate to field general courts martial and to any matters preliminary or incidental thereto or consequential thereon, shall apply so far as applicable or practicable to military courts and to any matters preliminary or incidental thereto or consequential thereon in like manner as if military courts were field general courts martial and the accused were persons subject to military law charged with having committed offences on active service.

After specifying those provisions of the Army Act and the Rules of Procedure which are not to apply to Military Courts, the Regulation then goes on to state that no departure from any procedural rule or other provision contained in the Army Act or the Rules of Procedure shall affect the jurisdiction of, or the validity of any proceedings by or before, any military court, or of any proceedings preliminary or incidental thereto or consequential thereon, unless in the opinion of the court, or of the confirming authority, substantial injustice has thereby been done to the accused.

For the purposes of these Regulations, " Army Act " means the Army Act of the United Kingdom as made applicable from time to time to members of the Canadian military forces ; and " Rules of Procedure " means the Rules of Procedure made pursuant o the Army Act, as made applicable from time to time to members of the Canadian military forces. (Regulation 2 (*b*) and (*e*).)

IX. SPECIAL RULES OF EVIDENCE APPLICABLE IN PROCEEDINGS BEFORE CANADIAN MILITARY COURTS

In general the rules of evidence followed by a Canadian Military Court are those followed in the ordinary criminal courts, but in view of the special character of war crime trials, and the exceptional circumstances under which they are often held, Regulation 10 introduces a certain relaxation in the rules regarding the admissibility of evidence.

Thus, Regulation 10 (1) provides that, " at any hearing before a military court convened under these Regulations the court may take into consideration any oral statement or any document appearing on the fact of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a field general court martial." The paragraph then proceeds to set out some examples of the possible operation of this general provision,

while making it clear that these examples do not prejudice the generality of the principle just quoted ; for instance, the following provisions are made :

" (*a*) if any witness is dead or is unable to attend or to give evidence or it is, in the opinion of the court, not practicable for him to do so, the court may receive secondary evidence of statements made by or attributable to such witness ; . . .

" (*d*) the court may receive as evidence of the facts therein stated any depositions or any record or report of any military court or military court of inquiry or of any examination made by any officer detailed for the purpose by any military authority ; . . .

" (*g*) any statement made prior to trial by an accused or by any witness at such trial, whether or not such statement was made on oath, and whether made before or after or without the giving of any caution, shall be admissible in evidence for all purposes."

Regulation 10 (2) provides that it shall be the duty of the court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible. The result is that a wide variety of evidence is admissible, yet no injustice is done to the accused, since the Court has the final responsibility of judging the weight to be placed on every item of evidence put before it.

X. SPECIAL RULES OF EVIDENCE LAYING DOWN CERTAIN LEGAL PRESUMPTIONS

Regulations 10 (3), (4) and (5) lay down that, in certain stated circumstances, the proof of offences committed by groups of persons shall constitute *prima facie* evidence of responsibility on the part of certain individuals. Of these provisions, Regulation 10 (3), of which the effect is substantially the same as that of Regulation 8 (ii) of the British Royal Warrant,(1) runs as follows :

" Where there is evidence that a war crime has been the result of concerted action upon the part of a formation, unit, body, or group of persons, evidence given upon any charge relating to that crime against any member of such a formation, unit, body, or group may be received as *prima facie* evidence of the responsibility of each member of that formation, unit, body, or group for that crime ; in any such case all or any members of any such formation, unit, body, or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the court."

The Canadian Regulations 10 (4) and (5) make the following provisions :

" (4). Where there is evidence that more than one war crime has been committed by members of a formation, unit, body, or group while under the command of a single commander, the court may receive that evidence as *prima facie* evidence of the responsibility of the commander for those crimes.

(1) *See War Crime Trial Law Reports*, Vol. I, pp. 108-109

" (5). Where there is evidence that a war crime has been committed by members of a formation, unit, body, or group and that an officer or non-commissioned officer was present at or immediately before the time when such offence was committed, the court may receive that evidence as *prima facie* evidence of the responsibility of such officer or non-commissioned officer, and of the commander of such formation, unit, body, or group, for that crime."

Reliance was placed by the Prosecution in the Trial of Kurt Meyer upon Regulations 10 (3), (4) and (5), and the views expressed by the Judge Advocate and by Counsel in that trial are recorded elsewhere.(1) It is clear that these provisions do not purport to define the extent to which a commander is legally liable for offences committed by the troops under his command ; they relate to matters of evidence and not substantive law. Furthermore, they provide discretionary powers and are not mandatory in nature.

XI. REPRESENTATION BY COUNSEL

Regulation 9 provides that Counsel may appear on behalf of the Prosecutor and accused in like manner as if the military court were a General Court Martial. The Regulation adds, however, that in addition to the persons deemed to be properly qualified to act as Counsel before a General Court Martial, any person qualified to appear before the courts of the country of the accused and any person approved by the Convening Officer shall be deemed to be properly qualified as Counsel for the Defence.

XII. SUPERIOR ORDERS

Regulation 15 makes a provision regarding the plea of superior orders which, while it does not appear explicitly in the Regulations attached to the British Royal Warrant, does correspond to the general practice followed in the war crime trials conducted by various Allied nations, in so far as it recongises the plea not as a complete and universally valid defence but only as a matter which the Court *may* consider in suitable instances as a defence or as a mitigating circumstance :

" The fact that an accused acted pursuant to the order of a superior or of his government shall not constitute an absolute defence to any charge under these Regulations ; it may, however, be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires."

XIII. PUNISHMENT OF WAR CRIMES

Under Regulation 11 (1) a person found guilty of having committed a war crime may be sentenced to any one or more of the following :

(*a*) Death (either by hanging or by shooting) ;
(*b*) imprisonment for life or for any less term ;
(*c*) confiscation ;
(*d*) a fine.

(1) See pp. 107-8 and 110-12.

The Court may also order the restitution of any money or property taken, distributed or destroyed by the accused, and award an equivalent penalty in default of complete restitution (Regulation 11 (2). It is also provided, in Regulation 11 (3), that sentence of death shall not be passed on any person by a military court without the concurrence of all those serving on the court if the court consists of not more than three members, including the President, or without the concurrence of at least two-thirds of those serving on the court if the court consists of more than three members, including the President.

XIV. APPEAL AND CONFIRMATION

No right of appeal in the ordinary sense of that word exists against the decision of a Canadian Military Court. The accused may, however, within 48 hours give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both. The petition must be submitted within 14 days. If it is against the finding it shall be referred by the Confirming Officer to the Canadian Judge Advocate General or to his deputy. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or the Rules of Procedure or any technical or other defect or objection. An exception exists only in the case where it appears that a substantial miscarriage of justice has actually occurred. These provisions are made by Regulations 12 and 13 ; Regulation 14, however, adds that : " When a sentence passed by a military court has been confirmed, the senior combatant officer of the Canadian forces in the theatre in which the trial took place not below the rank of major-general or its relative rank, or any officer not below the rank of brigadier, or its relative rank, authorised by him, shall have power to mitigate or remit the punishment thereby awarded or to commute such punishment for any less punishment or punishments to which the offender might have been sentenced by the said court : Provided that this power shall not be exercised by an officer holding a command or rank inferior to that of the officer who confirmed the sentence."

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